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(18,745)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 165.

THE GREAT SOUTHERN FIRE PROOF HOTEL COMPANY,

PETITIONER,

vs.

BENJAMIN F. JONES, GEORGE M. LAUGHLINS AND BENJAMIN F. JONES, JR., ET AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF ON BEHALF OF PETITIONER.

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STATEMENT.

I.

Your petitioner is a corporation duly incorporated under the laws of the State of Ohio, and now is, and has ever been, since the date of its incorporation, a citizen of said state and of no other, having its residence and principal place of business in the city of Columbus in said state; and the respondents (appellees below), Benjamin

F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary E. Laughlin, Mary McM. Laughlin, Magdaline Laughlin, Willis L. King, Henry A. Laughlin, Charles C. Briggs, Eliza L. Phillips and Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary T. Hilliard and Thomas M. Jones, Jr., are members of a limited partnership association, doing business under the firm name and style of Jones & Laughlins, Limited (the respondents being hereinafter designated for convenience as Jones & Laughlins, Limited), which association was organized under the act of the General Assembly of Pennsylvania, approved June 23, 1874, entitled, "An act authorizing the formation of a partnership association in which the capital subscribed shall alone be responsible for the debt of the association, except under certain circumstances," each and all of which members of said association have their residence and place of business in the city of Pittsburg, in the state of Pennsylvania, and said limited partnership or association, and the members thereof, and each of them are and for many years past have been, citizens of said state, and of no other, residing in the city of Pittsburg and in the state of Pennsylvania.

II.

Your petitioner, on the tenth day of October, 1894, made and entered into a contract in writing with one William J. McClain, who in consideration of the sum of three hundred and forty-five thousand dollars ($345,000), agreed to do and perform all the necessary work and labor, and provide and furnish all proper and necessary materials, machinery, apparatus and tools for, and would construct and complete and made tenantable for your petitioner, a fire-proof hotel and opera house building, and thereupon the said William J. McClain did forthwith proceed towards the construction of said improvment on your petitioner's real estate in the city of Columbus, Franklin county, Ohio, known as In-Lots Nos. three hundred and fifty-two (352), three hundred and fifty-three (353), and three hundred and fifty-four (354), in said city.

III.

On or about the thirteenth day of December, 1894, the said Jones & Laughlins, Limited, made and entered into a contract in writing with the said William J. McClain, the principal contractor with your

petitioner, for the erection and construction of the aforesaid fire-proof hotel and opera house buildings, wherein it was provided that the said Jones & Laughlins, Limited, should furnish the said William J. McClain nine hundred (900) tons of structural steel for the said fire-proof hotel and opera house building, said structural steel to be furnished for the sum of thirty-two thousand five hundred and eight dollars ($32,508.00), F. O. B. cars, Columbus, Ohio, and further provided that if more than the nine hundred tons named in said contract be required, that the said Jones & Laughlins, Limited, would furnish the same at the rate of $1.81 per hundred pounds to be delivered in said city, or if a less amount be required than the said nine hundred tons, that the said Jones & Laughlins, Limited, would allow a reduction from the contract price at the rate of $1.81 a hundred pounds for the difference between the amount shipped and the nine hundred tons above mentioned. Said Jones & Laughlins, Limited, were to commence shipping said steel at once, and should complete the delivery thereof before August 1, 1895. The terms of payment for said steel was cash to be paid on the fifth day of each month following shipment (page 9, printed record, Exhibit A).

IV.

In accordance with the terms of said written contract between the said Jones & Laughlins, Limited, and the said William J. McClain, the said Jones & Laughlins, Limited, claimed to have furnished to the said McClain structural steel for said building alleged to be of the value of forty-three thousand two hundred and ninety-six and 74-100 dollars ($43,296.74), which structural steel was used by the said William J. McClain in and about the construction and erection of said fire-proof hotel and opera house building, and payments were made by the said William J. McClain to the said Jones & Laughlins, Limited, on account of the structural steel so claimed to have been furnished in the sum of thirty-one thousand eight hundred eighty-six and 72-100 dollars ($31,886.72), leaving a balance as claimed by the said Jones & Laughlins, Limited, due to them from the said McClain, of eleven thousand four hundred and ten and 2-100 dollars ($11,410.02).

V.

On the twenty-first day of April, 1896, at 4:50 o'clock p. m., within four months after having furnished the last structural steel

to the said William J. McClain, the said Jones & Laughlins, Limited, for the purpose of obtaining a mechanic's lien on the real estate, hotel building and opera house hereinbefore mentioned, and owned by your petitioner, duly filed with the Recorder of Franklin county, Ohio, an affidavit purporting to contain an itemized statement of the amount and value of the merchandise claimed to have been furnished by them under their contract with the said McClain, with the credits thereon, and a copy of the said written contract between them and the said McClain, and also a description of the aforesaid premises, and caused said affidavit to be recorded in book No. 9, pages 99, 100 and 101 of the Records of Liens of said Franklin county, Ohio, in which said affidavit the said Jones & Laughlins, Limited, claim that there was due them from the said McClain on account of structural steel furnished by them to him, the said sum of eleven thousand four hundred ten and 2-100 dollars ($11,410.02) with interest from January 28, 1896, and that they have a mechanic's lien on the aforesaid premises of petitioner for said amount.

VI.

Your petitioner further says that at the time of the making of the contract between your petitioner and the said McClain, as principal contractor, for the erection and construction of said fire-proof hotel and opera house building, and also at the time of the filing by the said Jones & Laughlins, Limited, of their aforesaid affidavit to procure a mechanic's lien on the aforesaid premises in said recorder's office and at all intervening times, the mechanic's lien law of Ohio was embodied in Section 3184 of the Revised Statutes of Ohio (91 Ohio Law, p. 135), Section 3185, Revised Statutes of Ohio (Giaque, Bates, Smith and Benedict edition) and Section 3185a, Revised Statutes of Ohio (91 Ohio Laws, p. 137), which said sections are as follows, to-wit:

> "Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas well, oil well or any other well, or performs labor of any kind whatsoever, in altering, repairing, constructing any

oil derrick, oil tank, oil or gas pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof, or his agent, trustee, contractor or sub-contractor, shall have a lien to secure the payment of the same upon such boat, vessel or other water craft, or upon such house, mill, manufactory, or other building or appurtenance, fixture, bridge or other structure, or upon such gas well, oil well or any other well, or upon such oil derrick, oil tank, oil or gas pipe line, and upon the material and machinery so furnished, and upon the interest, lease-hold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed."

"Sec. 3185. Such person, in order to obtain such lien, shall, within four months of the time from performing such labor or furnishing such machinery or material, file with the recorder of the county where the labor was performed, or the machinery or material furnished, an affidavit containing an itemized statement of the amount and value of such labor, machinery or material, or any part thereof, with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder and a description of the land on which the gas well, oil well or other wells are situated, or the land on which the house, mill, manufactory, or other buildings or appurtenances, fixture, bridge or other structure may stand, or to which it may be removed, and the same shall be recorded in a separate book to be kept therefor, and shall operate as a lien from the date of the first item of the labor performed, or the machinery or material furnished upon or toward the property designated in the preceding section, and the interest of the owner in the lot or land on which the same may stand, or to which it may be removed, for six years from and after the date of the filing of such attested statement. If an action be brought to enforce such lien within that time the same shall continue in force until the final adjudication thereof, and there shall be no homestead or other exemption against any lien under the provisions of this chapter.

Sec. 3185a. In all cases where the labor, machinery or material referred to in Sections 3184 and 3185, shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contrator

for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding sub-contractors, material-men or laborers, fix an unreasonably low price in the original contract for any work or material for which a lien is given under section 3184, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such sub-contractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

VII.

On the ninth day of January, 1897, the said Jones & Laughlins, Limited, in their partnership name and not as individuals, filed their bill of complaint in the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio, in the Sixth Judicial Circuit, against the said Great Southern Fireproof Hotel Company and others to enforce its alleged mechanic's lien on the said real estate of the said hotel company, alleging among other things the execution of their contract with the said McClain; the furnishing of structural steel to him for said building; the sum still due them; the insolvency of the said McClain; the filing of their affidavit with the recorder of said county, to procure a mechanic's lien and praying that their alleged claim against the said McClain be declared a valid and subsisting lien on the premises of the said hotel company; that the liens on said property be marshaled, and the said premises sold and their claim satisfied out of the proceeds of such sale, and for all further proper relief.

Thereafter the solicitors of said hotel company on its behalf, filed a demurrer to said bill of complaint, on the ground that said bill did not make or state such a cause as entitled said partnership to recovery or relief sought and prayed for therein.

On the third of May, 1897, the Honorable George R. Sage, district judge of said court, found said demurrer well taken, and did allow and sustain the same, and the complainants, not desiring to amend their respective pleadings, the same were dismissed at their costs. The decision so rendered is found in the 79 Fed. Rep., 477.

Thereafter the said Jones & Laughlins, Limited, prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, and on the sixteenth day of April, 1898, the said last named

court rendered a judgment reversing the judgment of the said Circuit Court for the Southern District of Ohio, Eastern Division, and remanded said cause to said last named court with directions to overrule said demurrer and require said hotel company to answer. The decision of the said Circuit Court of Appeals is reported in 86 Fed. Rep., p. 370.

Thereupon the hotel company filed its petition and motion in this honorable court, praying that a writ of certiorari be issued and directed to the said United States Circuit Court of Appeals in the case appealed thereto by the said Jones & Laughlins, Limited, against the said hotel company, and that said cause he reviewed and determined by this court, and for a reversal of the judgment of the said Circuit Court of Appeals in said cause and for all proper relief.

Thereupon said cause was certified to this court, and on the ninth day of April, 1900, the judgment of the said Circuit Court of Appeals and the said Circuit Court were reversed, and the said cause was remanded to said Circuit Court with direction that the said Jones & Laughlins, Limited, should be permitted to proceed to a final hearing providing they were able to amend their pleadings upon the subject of citizenship of the parties so as to come within the rule announced by this honorable court. The decision so rendered by this honorable court is reported in the 177 U. S., 449.

VIII.

On the twenty-first day of June, 1900, the said Benjamin F. Jones, George M. Laughlin, Benjamin F. Jones, Jr., Mary F. Laughlin, Mary McM, Laughlin, Willis L. King, Henry A. Laughlin, Charles C. Briggs, Eliza L. Phillips, Benjamin F. Jones and William L. Jones, trustees under the last will and testament of Thomas M. Jones, deceased, for William L. Jones, Mary J. Hilliard and Thomas M. Jones, partners, doing business under the firm name and style of Jones & Laughlins, Limited, as individuals, filed their amended bill of complaint in the Circuit Court of the United States for the Eastern Division and the Southern District of Ohio, in the Sixth Judicial Circuit against the Great Southern Fireproof Hotel Company and certain others who claim liens on said premises, which amended bill recites that each and every of said respondents is a citizen and resident of the state of Pennsylvania, and otherwise con-

tains the same averments and prays the same relief as the original bill of complaint mentioned in paragraph VII, supra.

The solicitors of the said hotel company, on the seventeenth day of July, 1900, filed a demurrer to said amended bill of complaint for the same reason, and on the same ground and in the same form as were set forth and as appeared in the demurrer filed by said hotel company to the original bill filed by Jones & Laughlins, in their partnership name, and as recited in paragraph VII, supra. The Circuit Court, feeling itself bound by the decision of the Circuit Court of Appeals, overruled said demurrer, to which ruling your petitioner excepted.

IX.

The Great Southern Fire-Proof Hotel Company, believing the liens asserted on account of the unconstitutionality of the Ohio mechanic's lien law, is invalid, filed an answer to the amended bill and admitted the filing with the recorder of Franklin county, Ohio, of what purports to be an affidavit to obtain a mechanic's lien, and averred that the affidavit mentioned in said amended bill was filed and their alleged mechanics' lien upon the Great Southern Fire-Proof Hotel Company's said real estate was claimed pursuant to and under the right which was conferred by Sec. 3184 of the Rev. Stat. of Ohio (91 O. L., 135), Sec. 3185 R. S. of Ohio (Giaque's, Bates', or Smith & Benedict's Edition), and Sec 3185a R. S. of Ohio (91 O. L., 135), which statutes are, so far as they attempt to give a lien for materials or labor obtained by the contractor from a sub-contractor, material-man or laborer, unconstitutional and void in that they violate the inalienable right of enjoying liberty and acquiring property granted by Sec. 1 of the Bill of Rights of the Constitution of the State of Ohio; that on December 8, 1896, the Supreme Court of the state of Ohio, being the highest court of the state, determined and adjudged that said statutes, so far as they give a lien on the property of the owner to sub-contractors, laborers and those who furnish machinery, material or tile to the contractor, were unconstitutional and void, because they contravene and violate the provisions of said first section of said Bill of Rights of the Constitution of Ohio, in the cases of Palmer & Crawford vs. Tingle, and Young vs. Liom Hardware Company, 55 O. S. Rep., 423.

That said decision was rendered in cases which involved alleged

rights under state statutes and that it determined the validity of the state statutes under the constitution of the state of Ohio, and that the United States Courts should follow the decision of the Supreme Court of Ohio.

The said Great Southern Fire-Proof Hotel Company further averred that it seeks against the attempts on the part of the complainants to enforce against it the said statutes of Ohio, because the operation of said statutes, if permitted, would take from said company its property without due process of law, and deny to it the equal protection of the law, in contravention and violation of the provisions of the Constitution of the United States, and are especially contrary to and in violation of Sec. 1 of Art. XIV of the amendments to the Constitution of the United States and prayed the court to decree that the aforesaid sections of the Revised Statutes of Ohio are unconstituional and void, for a dismissal without costs and other proper relief.

The complainants filed their replication to such answer, and thereafter the respondents (complainants below) and The Great Southern Fire-Proof Hotel Company entered into an agreed statement of facts or stipulation which fully appears on pages 53 to 59, printed record, top page 31 to 36.

X.

The said case in the said Circuit Court of the United States for the Southern District of Ohio, Eastern Division, was heard before and decided by the Honorable Albert C. Thompson, district judge of the United States Court for the District of Ohio, upon the amended bill of complaint, the answer of the Great Southern Fire-Proof Hotel Company to the amended bill of complaint, the replication of complainant and the agreed statement of fact and stipulations heretofore mentioned, and the said court did on the twentieth day of August, 1901, render a judgment therein, and did find that the respondents have a valid and subsisting lien upon said hotel company's premises from and after the sixteenth day of April, 1895, being the date on which the first item of material mentioned in said affidavit was furnished; that there is due to respondents by virtue of said lien the sum of $11,410.02, with interest thereon from the twenty-eighth day of January, 1896, amounting in all at the date of such decree to $15,158.21; that said amount is due on account of

said lien, and materials furnished in and about the construction of the building upon said premises hereinbefore described, and that no part of said amount has ever been paid, and that the respondents are entitled to have said lien foreclosed, and did order and decree that unless the costs of said suit, and the amount found due the plaintiffs with interest from the nineteenth day of June, 1901, shall be paid within ten days, the said hotel company's equity of redemption in said premises should be foreclosed, and an order should issue to the marshal of this district, directing him to appraise, advertise and sell said premises according to law.

To each and every of which said findings, orders and decrees of the court The Great Southern Fire-Proof Hotel Company excepted, and gave notice of and prayed an appeal from each and every of said findings, orders and decrees to the United States Circuit Court of Appeals for the Sixth Circuit, and gave notice for its desire to give a supersedeas bond to stay execution, order of sale and other proceedings on the decree herein rendered until the final determination of such appeal; and such appeal was granted and the court allowed an appeal to said The United States Circuit Court of Appeals for the Sixth Circuit, and fixed the amount of said appeal bond.

XI.

On the twentieth day of August, 1901, the petition of appeal of the said Great Southern Fire-Proof Hotel Company, against the respondents, together with its assignment of error, was filed in the clerk's office of said Circuit Court, and bond was given, and thereupon a certified transcript of the record of all proceedings of said Circuit Court in said case was filed in the United States Circuit Court of Appeals for the Sixth Circuit, and said case was entered and docketed as The Great Southern Fire-Proof Hotel Company, appellant, against Benjamin F. Jones et al., appellees. No. 1034.

XII.

The assignment of errors filed on behalf of the said The Great Southern Fire-Proof Hotel Company to the judgment rendered in favor of Jones & Laughlins, Limited, omitting those which relate purely to questions of fact, and arise on the evidence, was as follows:

1. The United States Circuit Court for the Southern District of

Ohio, Eastern Division, erred in overruling the demurrer interposed by the said The Great Southern Fire-Proof Hotel Company to the amended bill of complaint of said Jones & Laughlins, Limited.

2. The said court in holding and decreeing the mechanic's lien law of Ohio, especially each and every section thereof known as sections 3184 (91 O. L., p. 135), 3185 (Bates' Annotated Ohio Statutes), and 3185a (91 O. L., p. 137), under which said sections the said The Jones & Laughlins, Limited, seek to enforce the purported lien set out in their amended bill of complaint, to be constitutional, and not in contravention and violation of section one (1) of the Bill of Rights of the Constitution of the State of Ohio, and of section one (1), article fourteen (14), of the Constitution of the United States.

3. The said court erred in not following the decision of the Supreme Court of the state of Ohio in the cases of Palmer & Crawford vs. Tingle, and Young vs. Lion Hardware Company, 55 O. S., 423, holding the said mechanic's lien law unconstitutional, to wit, Secs. 3184 (91 O. L., p. 135), 3185 (Bates' Annotated Ohio Statutes), and 3185a (91 O. L., p. 137), under which the said Jones & Laughlins, Limited, claimed and sought to enforce the purported lien set out in the amended bill of complaint, which said decision was rendered prior to the commencement of this action. * * *

7. The said court erred in rendering a judgment and decree in said cause in favor of Jones & Laughlins, Limited, and against the said Great Southern Fire-Proof Hotel Company.

8. The judgment and decree rendered by said court should have been rendered in favor of said The Great Southern Fire-Proof Hotel Company, and against The Jones & Laughlins, Limited.

The Great Southern Fire-Proof Hotel Company therefore prayed that the said decree and holdings of said Circuit Court of the United States, Southern District of Ohio, Eastern Division, be reversed, and that said court be directed to enter a decree dismissing the amended bill of complaint, and for such other orders as the justice and equity of this cause may require.

XIII.

The said case came on to be heard on the appeal above mentioned before the said Circuit Court of Appeals on the seventh day of May, 1902, before the Honorable William R. Day, Horace H. Lurton

and Henry F. Severns, and on the third day of June, 1902, the said court rendered a judgment affirming the said judgment of the Circuit Court in favor of Jones & Laughlins, Limited.

ARGUMENT.

Your petitioner claims that the judgment of the said Circuit Court of Appeals is erroneous in that said mechanic's law was held to be constitutional and said judgment was rendered in favor of the said Jones & Laughlins, Limited, whereas said law should have been held unconstitutional and said judgment should have been rendered in favor of your petitioner, for the following reasons and on the following grounds, to wit:

I.

The mechanic's lien law of Ohio of 1894 is unconstitutional because:

a. It denies to the owner of real estate the right of acquiring, possessing and protecting property, and the right of contract in relation thereto, of making and enforcing contracts, of fixing and limiting the consideration therefor, and the manner and time of payment, and is not for the equal protection and benefit of the people, and therefore contravenes Sections 1 and 2 of the Bill of Rights (Art. 1, Constitution of Ohio), which sections are as follows:

> "Sec. 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."
>
> "Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc.

b. It deprives the real estate owner of his property without due process of law, and of the equal protection of the laws, abridges the privileges of citizens of the United States as regards the rights of contract and is therefore unconstitutional and in conflict with Sec. 1, Art. XIV, of the Constitution of the United States which recites, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

II.

a. The Circuit Court of Appeals should have followed the decision of the Supreme Court of Ohio (Palmer vs. Tingle, 55 O. S., 423), rendered before the said Jones & Laughlins, Limited, instituted any suit, and holding said law unconstitutional, because there was not presented to said Circuit Court any question as to negotiable paper, municipal bonds, general commercial law, or general jurisprudence, or any matter of interstate transportation and commerce, or any question other than the constitutionality of a law of the state of Ohio having no extra territorial effect.

b. The said Circuit Court of Appeals should have followed the decision of the Supreme Court of Ohio holding the law unconstitutional for the reason that the Supreme Court of Ohio has at all times recognized and enforced the doctrine that the rights of material-men and sub-contractors are limited and defined by and dependent upon the contract between the owner and the original contractor, and are to be worked out through it, which construction of the mechanic's lien law of Ohio obtained at the time the said Jones & Laughlins, Limited, made their contract with McClain, and at the time the said McClain contracted with your petitioner, nor has there at any time been a change made by the Supreme Court of Ohio in judicial construction as to the mechanic's lien law, or laws of said state; and during the time within which the said Jones & Laughlins, Limited, were furnishing labor and material to the said William J. McClain, to be used in said hotel and opera house building; the said case of Palmer & Crawford vs. Tingle, and Young vs. The Lyon Hardware Company, in which the constitutionality of the said mechanic's lien law was called in question, was pending in the courts of Ohio, and the decision rendered therein by the Circuit Court of Putnam county, Ohio, (9 O. C. C., 708), was made at the November Term of said court in 1895, and the said Jones & Laughlins, Limited, were apprised of the fact that the constitutionality of said law was questioned. The decision of the said Circuit Court of Appeals is in conflict with the decision of the Supreme Court of Ohio, and the doctrine relating to the mechanic's lien law which had uniformly been recognized by said Supreme Court in said state.

The importance and gravity of the questions raised and presented by the petitioner's demurrer to the bill and its aforesaid answer will be recognized when it is stated that under the provisions of said

mechanic's lien law there is given to the material-men and sub-contractor without notice to the owner, at any time within four months from the completion of the improvement on the owner's real estate for the furnishing of labor or material, and in any amount not in excess of the original contract price between the owner and such principal contractor, regardless of the state of the account between the owner and such principal contractor, a lien against such real estate, and thus the owner may be compelled to pay for his improvement in whole or in part a second time, and to a person with whom he sustains no contractural relations, although the owner may have acted in strict compliance with his contract, paid in advance or as his improvement progressed; that such law has no application to any or all kinds of contracts but is limited in its operation to a special class of contracts, viz.: To those made by persons who labor or furnish materials for the objects named in the act and thus discriminate in favor of a special class of citizens to the exclusion of all others; that such law places upon the owner of real estate a burden that is not borne by the owner of any other class of property; that such law denies to the owner of real estate the right to enjoy and possess property and contract in relation thereto as he may deem best; that such law denies the owner of real estate the right to contract with reference to his property other than a monied consideration, and deprives him of the right of fixing the amount, or medium of payment for improvements made on his property, in that he may be compelled to pay a second time, as aforesaid, and may be compelled to pay in money, although he may have contracted to pay in some other commodity; that such law makes the owner of real estate, by force of legislation, security for the original contractor that such original contractor will perform his contract and thus defeats the owner of the enjoyment of his property; that such law divests the owner of his title without any act, tort or default on his part, and thus deprives him of the equal protection of the laws and of his property without due process of law; that such law tends to drive small and insolvent contractors out of business, and leaves the contract business in the hands of those who are rich enough to guarantee their contracts; that such law compels the owner of property to pay any claim or claims up to the full extent of twice the contract price, and gives him no recourse except an action by damages against the original contractor.

The Mechanic's Lien Law of 1894 is Unconstitutional.

The act of 1894, being the one under which the lien claimants have proceeded, runs counter to all former Ohio legislation on the subject. Sec. 3184 specifies the property on which a mechanic's lien may be taken. Sec. 3185 fixes the time within which the lien may be taken, designates the steps required to perfect a lien and the period of the lien's continuance. The lien is limited by Sec. 3185a to the actual value of labor, material or machinery furnished. In the absence of fraud or collusion between the owner and the original contractor, the aggregate amount of liens is not to exceed the contract price agreed upon between the owner and the original contractor for the labor performed and material and machinery furnished.

The law sought to give a direct and independent, and not a derivative, lien on the owner's property in favor of the subcontractor, laborer and material man. The filing of affidavits with the recorder of the county, if the law be valid, may give an absolute lien in favor of the claimant, up to the full amount of the owner's original contract price, regardless of the state of accounts between him and his original contractor. Although the owner may have paid in strict accordance and complied with every term of his contract, and may have paid the full contract price for his building, yet, under the Act of 1894, if the original contractor fails or neglects to pay his subcontractors or laborers, they may acquire liens on the owner's premises for their several claims for an amount not exceeding the original contract price of the building. Thus the owner, notwithstanding his having acted honestly and in good faith, may be compelled to pay twice for his building, and to persons with whom he has no privity of contract and who are strangers to him. The contract price ceases to be the measure of the cost of the owner's building, or of what lien holders may recover. The lien may be taken without notice to the owner at any time within four months from the date of the performance of the last item of labor or the furnishing of the last item of material or machinery.

The owner is made the guardian, as it were, of every laborer and sub-contractor having anything to do with the construction of his building, whoever such person may be and wherever he may be located. If the owner contract to pay and does actually in good faith pay for his building in advance, or by the transfer of land, or by the cancellation and surrender of a previously existing claim

held against the original contractor (and he may lawfully do any of these things), he must nevertheless, according to the statute pay again and in money to the sub-contractor to discharge his lien and to the full amount of his contract price. The owner, one of the parties to the contract for the erection of the building, by force of legislation, is made surety that the original contractor will perform his contract. While everybody else can be required to pay but once for that for which he contracts, the unfortunate owner of land who attempts to improve it by erecting a building thereon, must pay twice, if his head contractor defaults in his payments to his laborers and sub-contractors, and no contract can be made so iron-clad as to relieve the owner of this double liability.

The law discriminates against the owner of land who wishes to improve it, in that it attaches terms and conditions not affixed to any other contract which may be made under the laws of Ohio. It discriminates against the financially poor contractor and in favor of the rich, because prudent owners will not enter into a contract with men who are not in any event able to pay, and out of their own means if necessary. It discourages the erection of houses by the poor, who must limit their expenditures to a specified sum, because under the statute, no one commencing the erection of a building can know what will be its ultimate cost. It makes the original contractor, whose interests are opposed to those of his principal, the owner's agent, in violation of the primary principle of law that an agent cannot serve two masters, one of them being himself. It relieves laborers and sub-contractors in the making of contracts from that ordinary degree of care and caution exacted of all other persons, and places the whole burden on the owner. The laborer and sub-contractor may remain indifferent as to the financial responsibility of the original contractor, for they may rely wholly upon the building, whatever disposition the original contractor may make of the cost price thereof; but the owner is charged with a high degree of care and diligence, and is practically forced to see personally to the application of the money which he pays to the original contractor, in order to avoid a double liability.

The Ohio mechanic's lien law of 1894 perverts the meaning of the terms, "sub-contract" and "sub-contractor;" for, a "sub-contractor, as its very meaning indicates, is subordinate to the original contractor. A sub-contractor's lien, therefore, depends on the original con-

tract, and is, like the lien of the contractor himself, governed by its terms." (Boisot on Mechanic's Liens, Sec. 228.)

The laborers and sub-contractors are in fact the agents of the original contractor, and having assumed the performance of his principal's contract with the owner they ought to be required to perform it according to its expressed limitations, and for the amount therein named. They should not have the benefit of a builder's contract without accepting its burdens, or the conditions on which those benefits are conferred. In the construction of the building, the laborer and sub-contractor is charged with notice of the general character of the building, as to the kinds and quality of material of which it is to be constructed, of the times at which the same are to be furnished, of the requirements of the plans and specifications with reference to which the building is constructed and must observe them in their minutest detail, and should he depart from the designs, dimensions, materials, and the like, as expressed in the original contract, he does so at his own peril. As to these matters he is not permitted to say that he does not know or that he is not bound by the terms of the contract between the owner and the original contractor.

But the law of 1894, while requiring knowledge of all such provisions of the contract, does not charge the laborer or sub-contractor with notice of the price to be paid for the building or the manner and time of payment, or limit him thereto or bind him thereby.

Such an extraordinary law did not after its enactment long remain unchallenged. At the November Term of 1895 of the Circuit Court of Putnam county, Ohio, the law was declared unconstitutional in the case of Palmer & Crawford vs. Tingle, 9 O. C. C., Rep., 708. The suit grew out of a mechanic's lien based upon a contract dated April 23, 1894, the very month in which the law in question was enacted. The Circuit Court of Clark county, in the case of the Lion Hardware Co. v. Young and others, which suit was based on a contract made on the twenty-ninth day of June, 1894, sustained the constitutionality of the statute. Both cases drifted into the Supreme Court, and on the eighth day of December, 1896, the Supreme Court of Ohio held the law to be unconstitutional in both cases. (55 O. S., 423.) The validity of the law was, therefore, challenged as speedily as circumstances would admit.

Sections 1 and 2 of the Bill of Rights (Art. 1, Const. of Ohio) are as follows:

"Sec. 1. All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.

Sec. 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit," etc.

In the case of Thaxter v. Williams, 14 Pick., 49, 53, it was claimed that one in the naked possession of land had power by contract to create a lien in favor of material men, etc., upon the land. But the Supreme Court of Massachusetts, by Wilde, J., denied this claim and held that "the legislature have not the constitutional power thus to enable one person to violate the right of property of another." How much less power has the legislature, as it has by this act attempted to do, to violate the right of property in another and deprive him of the same without his knowledge or consent, by virtue of a contract made by one not only not in possession of the property, but known to the material man, etc., to be only a contractor for the building without even an apparent title to the property. To uphold such a law would clearly deprive the owner of his property, not only without due process of law, but without any laches on his part or semblance of authority to contract for him.

"Constitutional liberty means not only the freedom of the citizen from servitude and restraint, but includes the right of every man to be free in the use of his powers and faculties, and to adopt such avocation or calling as he may choose, subject only to the restraints necessary for the common welfare. Rights of property preserved by all constitutions is right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following lawful pursuit. The property which each citizen has in his own labor is a common heritage, and as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. Right to contract is both a liberty and a property right. If any person is denied the right to contract and acquire property in the manner in which he has hitherto enjoyed it under the law, and which others are still allowed by law to enjoy, he is deprived of both the constitutional right of liberty and property."

Bracewell vs. People, 147 Ill., 66.

In State vs. Goodwell (33 W. Va., 179), Judge Snyder, delivering the opinion of the court, said: "The court, in People vs. Gillson, says: "The term liberty, as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration; but is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. 109 N. Y., 398; Field J., in Butcher's Union Co. vs. Crescent City, etc., Co., 111 U. S., 755; Association vs. Crescent City Co., 1 Abb. 398. The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment, both upon the just liberty and rights of the workman and his employer, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression. These principles have been fully recognized and announced in many decisions of the Supreme Court of the United States and other courts."

"The right of life, liberty and property are grouped together in the same sentence. They constitute a trinity of rights, and

each as opposed to any unlawful deprivation thereof is of equal constitutional importance. With each, under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principal right effectual and valuable in its most extensive sense pass as incidents to the original grant. The rights thus guaranteed are something more than mere privilege of locomotion; the guaranty is the negative of arbitrary power in every form which results in deprivation of right. These terms, life, liberty and property, are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrest, right to buy and sell as others may—all our liberties, personal, civil, political—in short, all that makes life worth living; and of none of these rights can any one be deprived except by due process of law."

State vs. Julow, 129 Mo., 172.

Within the definition given by these authorities, and there are many others to the same effect, it seems to us that there can be no question as to the unconstitutionality of this Ohio mechanic's lien law. It certainly deprives the owner of property of his right to make such contracts as other men may make; and deprives him of the right to contract with whom he chooses, a privilege which is not denied to any other citizen of the United States. He cannot make such contracts as he pleases, for if he contracts to have his house built at a considerable reduction in price by his payment of the money in advance, he may be compelled to pay the full amount all over again at the suit of sub-contractors or material men. Nor can he make a contract with whom he chooses, for he can only contract with one who is perfectly responsible and able to give a sufficient bond; for otherwise he is liable to be called upon to pay twice for the same work.

The Supreme Court of Ohio found that the law in question was in contravention of the provisions of the bill of rights; that "liberty to acquire property by contract, can be restrained by the General Assembly only so far as such restraint is for the general welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the General Assembly in such case is not conclusive;" and that the Act

of 1894, "in so far as it gives a lien on the property of the owners to sub-contractors, laborers and those who furnish machinery, material or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner."

It was conceded in the opinion that exemption laws, although they in a slight degree limit the liberty of contract, laws against usury and laws in other like cases restraining the liberty of contract are valid because the court can see in such cases that such laws are for the general welfare of the whole people and do not, therefore, interfere with their equal protection and benefit, but the court could not see that a law which requires a corporation to pay its employes at least twice in every month (State v. Iron Co., 55 O. S., 442), or a law which limited the hours of service of those employed on public works (Cleveland v. Construction Co., 67 O. S., 197), or a law like that in question, which takes away from the owner of a building the liberty of contract that the seller of materials may collect their value from a man who never purchased them and who has already paid the person with whom he contracted for all that he has received, is for the general welfare. "There can be no public necessity for making the contractor the agent of the owner, to enable the seller of materials to collect his pay from one who does not owe him, and with whom he has no contract. An agent can have no interest adverse to his master, but this statute attempts to create an agent for the owner out of the contractor, who is opposed to him in every interest. It is an attempt to make the contractor serve two masters, himself and the owner. This cannot be done. For this we have the highest authority."

The reasoning of the court coincides with that of Palmer & Crawford v. Tingle, 9 O. C. C., 708. The decision of the Ohio courts is abundantly sustained on reason and authority. Overton on Liens, Sec. 553, after announcing that the sub-contractor will be bound by the terms of the contract between the contractor and the owner of the building, adds: "Any statute or rule which should in any way deliver him as a workman from the obligations as taken by his superior, would at once violate the constitutional provision against laws which would impair the obligation of contracts." In Stewart v. Wright, 52 Ia., 335, it was said: "If one should contract with a builder to

erect a house and agree to pay him in advance and comply with his contract by making the payments, we very much question whether it is within the power of the legislature to require that he shall be liable to pay for his building twice, by paying all claims of sub-contractors who may assert claims after the payments have been made."

A law similar to that of Ohio was enacted in Michigan and in The John Spry Lumber Co. v. Trust Co., 77 Mich., 199, the law was declared unconstitutional because "it strikes at the foundation of all property and land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required and his freedom from default is no defense. He may pay in full or in advance, or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he has never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter excepting as a fact which binds no one and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer."

Other cases to the same effect are Mellis v. Race, 78 Mich., 80; Snell v. Race, 78 Mich., 334; Waters v. Wolfe, 162 Pa. St., 153, 170; Meyer v. Berlandi, 39 Minn., 438, 432.

In the last named case it was stated: "As liens are an encumbrance upon the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent or by due process of law. The basis of the right to enforce a claim, as a lien against property, is the consent of the owner, and it is upon this principle alone that laws giving liens to sub-contractors are sustained. The contract of the owner with the contractor is, under the law, the evidence of the authority of the latter to charge the property with liabilities incurred by him in performing his contract. O'Neil v. St. Olaf's School, 26 Minn , 329; Laird v. Moonan, 32 Minn., 358."

An interesting discussion of a law similar to that of Ohio is found in Selma Sash, Door and Blind Factory v. Stoddard, 116 Ala., 251. It was there said; "It is not denied, the legislature may establish proper rules of evidence, but not to the extent of depriving one of his property without due process of law; nor is it denied that the owner's contract is made under and subject to the provisions of the

existing lien law, provided these provisions do not infringe his constitutional rights. But, suppose the owner contract with another to erect a house, or to do any of the other things for which a lien is given under Section 2 of this Act, and he has paid, as required by Section 2½, and the work is not completed, and the contractor, who is still under obligations to complete the work, and is liable for not doing so, goes forward to complete it, with labor and materials of his own responsibility without the procurement of the owner, or his having in any way obligated himself for it, having performed his entire obligation under the laws to the contractor, sub-contractor and material men, can it be maintained on any principle of right guaranteed to us, that the owner shall be held liable without his own consent, for all that is done by the contractor in the completion of his contract? Is he required to notify sub-contractors and material men in writing not to come on his premises, and not to aid the contractor in performing his duty? How could he even hold his contractor liable for breach of his contract when the latter was able and willing, even, to perform it, if he should notify the sub-contractor, laborers and material men in writing not to perform such labor or furnish such material? The section goes too far. It over-reaches itself, in an effort to protect the sub-contractor and material man, at the expense of the owner, and gives them an advantage over him, which is not right or natural. While the owner should be just towards such parties, they ought to be just to him. The law should not constitute him their guardian, without their request, and hold him liable for things he never engaged to become responsible for by contract, express or implied, in any just or fair sense. * * * A sub-contractor or material man must take notice of the terms and character of the contract between the owner and the original contractor; and the legislature has no power to authorize a contractor to change the terms of his contract with the owner, and impose additional liabilities upon him, and liens upon his lands, by any agreement with other parties to which the owner was not a party, of which he has no notice, and there is no provision by which he can acquire such notice or information. The statute is clearly unconstitutional and void."

In Renton v. Conley, 49 Cal., 185, 187, a law similar to that of Ohio was involved. The pleadings were similar to those in this case in that the materials had been furnished to the con-

tractor and in that no express agency was averred. The agency relied on was the implied agency created by the statute. In that case, as in this, it was not alleged that any part of the contract price for the building remained unpaid from the owner to the contractor at the time of recording the notice of lien. It was claimed that the material man's lien was valid irrespective of the fact that the owner, when he first had actual or constructive notice thereof, may have paid to the contractor the full contract price when and as it became due under the contract. There was no provision in the lien limiting the lien to the amount which might be due from the owner to the original contractor under their contract, even though the materials were furnished at the instance of the contractor alone. The court held, however, that if the owner had made payments to the contractor in good faith under and in pursuance of the contract between them, before receiving notice, either actual or constructive, of the liens of material men and laborers, the building cannot be charged with liens exceeding the balance of the contract price remaining unpaid when notice of the lien was given.

The same doctrine is also found in McAlpine v. Duncan, 16 Cal., 127, and Bowen v. Aubrey, 22 Cal., 571.

Other cases bearing out the doctrine announced by the Supreme Court of Ohio, are Henry v. Rice, 18 Mo. App., 497, and Waters v. Wolfe, 162 Pa. St., 153. The latter case arose on a contract in which the contractor agreed that no lien should be filed against the owner's premises or on account of said contractor, and that no legal or lawful claim should be made against the contractor in any manner from any source whatever for work or materials furnished on the improvement. At the time the contract was made there was a statute in that state which required the written consent of the sub-contractor in order to bind him by a stipulation in the contract between the original contractor and the owner that no mechanic's lien should be filed. The Act was held to be unconstitutional in that it attempted to create a debt and give a lien therefor against the express provisions in the contract. The second section of the Pennsylvania Act also provided that the contractors shall be the agent of the owner in ordering work or materials and that any sub-contractor doing work or furnishing materials shall be entitled to a lien, notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless

such stipulations should be assented to by said sub-contractor. This was likewise held to be unconstitutional, in that it attempted to frame a new contract, and substitute it for the one made by the parties. The law was held to impair the right of contract, and overthrow the well settled doctrine of agency.

The Supreme Court of Ohio held the mechanic's lien law of 1894 unconstitutional because it invaded the liberty and property rights of the owner, for the privilege of contracting is both a liberty and a property right. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. The right to make contracts is one of the attributes of property, and when an indivdual is deprived of such right he is deprived of his property within the meaning of the constitution.

Ritchie v. The People, 155 Ill., 98.
Frorer v. People, 141 Ill., 171.
State v. Loomis, 115 Mo., 307.
Matter of application of Jacobs, 98 N. Y., 98.

The right to contract affords the only way by which a person can rightfully acquire property by his own labor. "Of all of the rights of persons, it is the most essential to human happiness." Leep v. St. L. I. M. & S. Ry Co., 58 Ark., 407.

> "The right to contract granted a corporation by its charter includes the right to *fix the price at which labor for it will be performed, and the mode and time of payment.* Each is an essential element of the right to contract, and a restriction as to either as it is enjoyed by the community at large is an abridgement of the constitutional right of liberty and property."
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> Braceville Coal Co. v. People, 147 Ill., 66.

It follows also from the Ohio decisions that the Act of 1894 is obnoxious as class legislation, for it imposes upon the property owner a burden attaching to no one else. It is not uniform in its operation. The principle is the same as that announced in State v. Ferris, 53 O. S., 314, wherein a law imposing a direct inheritance tax was held invalid because it exempted from taxation the right to receive or succeed to estates not exceeding $20,000 in value, and taxed the sole right of receiving or succeeding to estates which exceeded that sum in value, and also taxed at a higher rate per centum the right to receive or succeed to estates of a larger value than to estates of a smaller value.

So in the Hocking Valley Coal Co. v. Rosser, 53 O. S., 12, a law was held unconstitutional which provided that if a person to whom wages were due, demanded his wages in writing, and they be not paid, within three days after such demand, and suit be brought therefor, if a recovery be had as claimed in the bill of particulars, the judgment should include not only the amount claimed, but an attorney's fee not in excess of $5.00 to be paid to plaintiff's attorney, and if an appead were taken from such judgment and the plaintiff recover in a higher court a like sum exclusive of interest, an additional fee not in excess of $15.00 should be assessed against the unfortunate defendant. The principle of these cases is fully recognized and endorsed in Gulf, Colorado & Sante Fe R. R. Co. v. Ellis, 165 U. S., 150, in which the very cases relied on by the Supreme Court of Ohio in the Rosser case, *supra*, and Palmer & Crawford v. Tingle, *supra*, were cited and approved.

The Supreme Court of Illinois, in Ritchie v. People, 155 Ill., 98, held an Act unconstitutional which prohibited the employment of females in any factory or workshop for more than eight hours a day, on the ground that it was partial and discriminating in its character, whether applying only to manufacturers of wearing apparel, or to manufacturers generally, and in the opinion it is said: "If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right."

In Braceville Coal Co. v. People, 147 Ill., 66, it was held that: "A law singling out persons, corporations or associations, engaged in any particular business, and depriving them of the right to contract as persons, corporations or associations, engaged in any other business, may lawfully do, is unconstitutional and void."

Other cases in line with the foregoing are Godcharles v. Wigeman, 113 Pa. St., 431, and State v. Goodwill, 33 W. Va., 179, in both of which cases laws were held to be unconstitutional which prohibited coal and iron men from paying their employes with orders payable in goods or anything but money, and providing that even if such orders were honored, they might still be treated as void and a recovery had by the employes as fully as if such orders had not been paid.

"It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitutional laws, that any one citizen should enjoy privileges and advantages which are denied to all others, under like circumstances; or that one should be subjected to losses, damages, suits or action from which all others under like circumstances are exempt."

Holden v. James, 11 Mass., 396.
S. & N. Ala. R. R. Co. v. Morris, 65 Ala., 194, 199.
State v. F. C. Coal Co., 33 W. Va., 188.
Eden v. People, 161 Ill., 296.
Ex parte Jentzsch, 112 Cal., 468.

The law, if sustained, would as held in Palmer & Crawford v. Tingle, 55 O. S., 423, operate to exclude the small and financially weak contractors from business. It would deprive such persons of liberty in its broad sense as understood in this country, to wit, the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his lievlihood in any lawful calling, and to pursue any lawful avocation.

People v. Gillson, 109 N. Y., 389.

In Butchers Union, &c. Co. v. Crescent City, &c., Co., 111th U. S., 755, Mr. JUSTICE FIELD, in interpreting the inalienable rights referred to in the Declaration of Independence, said: "Among these inalienable rights, as proclaimed in that great document is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or avocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and calling of life, the ordinary trades and pursuits, which are innocuous in themselves and have been followed in all communities from time immemorial must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. It has been well said, 'The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper,

without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty of both the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the other from employing whom they think proper.' " State v. Goodwill, 33 W. Va., 179; State v. Peel Splint Coal Co., 36 W. Va., 856; Brannon on the Fourteenth Amendment, 110-112; Allgeyer v. Louisiana, 165 U. S., 578, 590.

It may be said that the law is not class legislation because it operates upon all within a class. But a law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all.

Ex parte Jentzsch, 112 Cal., 468.

"The mere fact of classification is not sufficient to relieve a statute from the reach of the equity clause of the 14th Amendment and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and it is not a mere arbitray selection."

Gulf, Colo. & Sante Fe R. R. Co. v. Ellis, 165 U. S., 150.

"The inhibition of the amendment (Fourteenth) that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."

Pembina Consolidated &c. Co. v. Pennsylvania, 125 U. S., 181, 188.

It may also be urged that the law is not class legislation in any greater degree than the laws regulating bankers, traders, married women, minors, and the like. Laws affecting bankers and traders, however, are for the benefit and protection of all the people, for the whole commerical and labor world depends upon the care, honesty and correct management of bankers. The laws relating to minors and married women are based on a different principle from the mechanic's lien law in question. Married women were at common law under many disabilities, which placed them in much the same category as minors, and for the protection of minors and married women and for the husbanding of their property, and for their proper susten-

ance, support and protection, special legislation was found necessary. The exemption in favor of the heads of families is for the protection of the home, and applies to every person that has a family. The exemption of a portion of the earnings of a laborer is likewise for the protection of the family and is beneficial to the whole people, because it is better that the laborer should be protected sufficiently than that he should become a charge upon the state or an object of charity. No such reasoning exists for the enactment of a mechanic's lien law like the one in question. Under the law which secured to the laborer and material man a derivative lien, and not a direct and independent lien as was given by the Ohio law of 1894, they may if they desire, know the very terms of the original contractor's lien, and contract with him or not, as they choose.

Their knowledge of the cost of building is almost invariably greater than that of the owner. The privilege accorded them of filing an affidavit with the owner before furnishing any labor or material reciting that they are about to furnish the same (and this has long been the law of Ohio), and thus stop the payment of money to the original contractor, affords them an ample remedy, unless they make an unwise contract, and at the same time the owner is enabled to protect himself.

The mechanic's lien law now in question deprives the owner of his property without due process of law.

This appears from many of the cases heretofore cited. "Due process of law" and "the law of the land" are synonymous, and used interchangably.

Cooley's Const. Lim. (3rd Ed.), Sec. 353;
Millett v. People, 117 Ill., 294.

Due process of law means "that every citizen shall hold his life, liberty, property and immunities under the protection of the *general* rules which govern society." Everything which may pass under the form of an enactment is not, therefore, to be considered as the law of the land.

Cooley's Const. Lim. (3rd Ed.), Sec. 353.

Such general public law must be founded on reason.

Harding v. People, 160 Ill., 439.

The privilege of contract being a liberty and a property right, no one can be deprived of it without due process of law.

Ritchie v. People, 150 Ill., 98.

> "Every one has a right to demand that he be governed by general rules, and special statutes which, without his consent, singles his case out as one to be regulated by a different law from that which is applied to all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free goverment."

Cooley's Const. Lim. (3rd Ed.), 391, 392.

The same author, Sec. 393, states that if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have the capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act will transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an indivdual or a class the right to the acquisition or enjoyment of property in such a manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness.

In this court which for so many years was honored by having as one of its members Justice Field, whose dissenting opinion in ex parte Newman, 9 Cal., 518, subsequently became the majority opinion in ex parte Andrews, 18 Cal., 678, and is now accepted as the law upon the question involved in those cases, we do not hesitate to claim that in the dissenting opinion of Cassiday, J., in the case, Mallory v. Abattoir Co., 80 Wis., 180, will be found the true reasoning and sound authority upon which this case should be decided, and as its value and force appear not in one, but in all parts thereof, we submit it in full, in the full expectation that the decision of the court which the learned judge awaited will vindicate the wisdom of his reasoning and the potency of his authorities.

CASSODAY, J. The question presented is whether the defendant, after having fully paid Nicholas Bros. the whole of the contract price, without any notice or any claim against them by the plaintiffs or any one else, is still bound to pay to the plaintiffs, as subcontractors, the

sum of $917.38 and interest. If such claim can be maintained, then upon the same principle the defendant would have been bound to pay such claim even had the contract required the defendant to pay in advance, and the amount had been so paid in full; or, even after such payment in advance, had Nicholas Bros. sublet the whole job, then the defendant would have been obliged to pay over again for all material and labor that went into the job, even though it greatly exceeded the contract price. If such claim can be maintained, then upon the same principle the legislature could make every purchaser of goods from a retail dealer, even for cash down, liable for any balance due thereon to the wholesale dealer. It is in effect conceded that no one can defend any such claim upon ethical grounds. The contention seems to be that the legislature had the power to disregard all ethical considerations, and make the defendant and every other land-owner absolutely liable for all material and labor going into any structure upon his land, regardless of whether he pays the contract price in advance, or subsequently and before notice of any claim in favor of any subcontractor, and that the legislature has done so by Ch. 333, Laws of 1889, which only requires notice to the owner or his agent "within sixty days after performing such work or labor or furnishing such materials."

I frankly concede that, if the enactment was within the power of the legislature, then the courts are bound to enforce it, regardless of their notions of its wisdow. It is, moreover, very obvious that the act did not impair the obligations of the defendant's contract, since the contract was made subsequent to the time when the act went into effect.

To my mind the act is repugnant to that provision of the Constitution of the United States which declares that "no state shall * * * deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Sec. 1, Art. XIV, Amendment.

That provision was ordained and established for the very purpose of taking away from every state and its legislature every one of the powers thus prohibited. Streubel vs. Mil. & Miss. R. Co., 12 Wis., 67, cited in the opinion of the majority of the court, was decided long before the constitutional provision was adopted, and of course has no bearing upon the binding force of that provision. The case of Munger vs. Lenroot, 32 Wis., 541, was decided subsequently

to the adoption of that provision, but neither the opinion of the court nor the dissenting opinion therein make any reference to it, and hence it must be assumed that it was not considered. The same is true in regard to Winslow vs. Urquhart, 39 Wis., 260, and other cases referred to in the majority opinion. These cases are entitled to be regarded as authority upon the question of construction therein determined and it seems to me they are not entitled to such weight as against the provision of the federal constitution quoted, which after all must be regarded as the supreme law of the land, anything in any state constitution or statute, or the decision of any state court, to the contrary notwithstanding. Art. VI, Const. of U. S. Besides, the question whether such legislation is repugnant to the constitutional provision quoted is one upon which the Supreme Court of the United States is the final arbitrator, and hence, until determined by that court, the question would seem to be open to the expression of opinion. That court has never passed upon the precise question here presented.

The act enables the contractor to limit his own duties, obligations, and liabilities by contract, and at the same time enables him, through the agency of a subcontractor, to bind the owner without limitation, for all materials and labor that go into the structure. The subcontractor is not even limited to the specifications contained in the original contract, for by the terms of the act he may compel the owner to pay for what he has never contracted for. It not only makes the owner, without his consent, responsible for the contractor's contracts with subcontractors, but also for his frauds. It authorizes the subcontractor to compel the owner to pay the contractor's debts after he has, without notice of any adverse claim, paid to the contractor the whole contract price to enable him to pay his own debts. It does not in terms prohibit the owner from paying in advance or paying without notice, but precludes him, as against a subcontractor, from the benefit of such payment. It authorizes the contractor, after the making of the contract, to do what the legislature could not then do; that is, to change the terms of the contract without the consent of the owner, and hence to impair its obligations.

Such legislation is a recent invention. It seems to belong to that class which Herbert Spencer had in mind when, according to a recent interview, he said: "Since I began to write, there has been a clear reaction against individual liberty. We are certainly tend-

ing toward state socialism, which will be a worse form of tyranny than that of any government now recognized in civilization." If we have no constitutional barriers against such legislation, then Mr. Spencer's opinion, that such reaction and tendency endanger the American states as well as the European, would seem to rest upon a solid basis, instead of being mere speculation, as might otherwise be supposed.

It seems to me that a man cannot reasonably be said to have due process of law, and equal protection of the laws, under an act which enables his contractor to bind him conclusively without his consent or knowledge and contrary to the express terms of their written contract, and merely permits him, when sued thereon, to answer to the effect that by the terms of the act he has become so bound and was unable to prevent it. On the contrary, before any conclusive statutory liability should be imposed upon any person, he should be guilty of some tort or give his consent, or be in default, or have such notice as would enable him to protect himself against gross injustice, otherwise the creation of such liability is an arbitrary and unjustifiable imposition.

By this provision of the constitution it was "undoubtedly intended", said Justices Field and Bradley, each speaking for the whole court, "not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoiliation of property, but that equal protection and security should be given to all, under like circumstances, in the enjoyment of their personal and civil rights; that all persons would be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the preservation and redress of wrongs, and the enforcement of contracts; that no impediments should be imposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions."

Barbier vs. Connolly, 113 U. S., 31; Bell's Gap. R. Co. vs. Pennsylvania, 134 U. S., 238. "Clear and hostile discrimination against particular persons and classes, especially such as are of an unusual character unknown to the practice of our governments, might be obnoxious to the constitutional prohibition." 134 U. S., 237.

So it has been said by Justices Bradley and Matthews, each speaking for the whole court, that, "in judging what is due process of

law, respect must be had to the cause and object of the taking—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'" Davison vs. New Orleans, 96 U. S., 107; Kentucky Railroad Tax Cases, 115 U. S., 33. In Chicago, M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418, the act of the legislature gave to the commission therein prescribed the final and exclusive authority to determine and fix what should be regarded as equal and reasonable rates of charges for the transportation of property, and the act was held to deprive the company of its property without due process of law, and to deprive it of the equal protection of the laws, and accordingly reversed the Supreme Court of Minnesota, holding to the contrary. State ex rel R. & W. Comm. vs. C. M. & P. R. Co., 38 Minn., 281. To the same effect is Minneapolis & E. R. Co. vs. Minnesota, 134 U. S., 467. Such imposition, through the agency of a public commission and fixed and public rates, upon any railway company entering into a contract for such transportation, was far less objectionable than to authorize a contractor, through the agency of a stranger and in secret, to impose such an arbitrary, unjust and absolute liability upon the land owner without his knowledge or consent or any certain means of ascertaining the fact until sixty days after the completion of the work or the furnishing of the material.

A statute similiar to the one in question was held void in Spry Lumber Co. vs. Sault Sav. Bank, Loan & Trust Co., 77 Mich., 199. In the opinion of the court in that case, by the late and learned Chief Justice Campbell, it is said: "It strikes at the foundation of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full, in advance or otherwise, for all he has contracted for. He may contract for a house built in a certain way and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can

make it plainer." In a recent case in Pennsylvania it has been held that a subcontractor is chargeable with notice of all the terms and stipulations of the contract between the owner and the principal contractor, and is bound thereby, since his only connection with such owner is through and by means of such contract. Schroeder vs. Galland, 134 Pa. St., 277. To authorize A., through the agency of a subcontractor, to impose an arbitrary, unjust and absolute liability upon B., without his default, and contrary to the express stipulations in the written agreement between them, and without any notice that will enable him to protect himself against such liabitity, and without his violating any statute or any law, or committing any tort or wrong, is, certainly, to deprive B. of his property or rights of property without due process of law, and to deprive him of the equal protection of the laws. King vs. Hayes, 80 Me., 206; Ulman vs. Mayor, 72 Md. 587; Garvin vs. Daussman, 114 Ind., 429; Oregon R. & N. Co. vs. Smalley, 1 Wash., 206.

It is true the opinion of the majority of the court is supported, not only by the decision of this court herein cited, but also of other state courts of high standing, the latest of which is by the Supreme Court of Tennessee, in a case not cited by counsel. Cole Mfg. Co. vs. Falls, 16 S. W. Rep. (Tenn.), 1045. But such cases either fail to meet the objection upon which this dissent is based, or meeting it, fail to give any satisfactory reason for excluding such statutes from the prohibitions mentioned. It may be that the Supreme Court of the United States will eventually sanction such legislation, but until they do so I am forced to withhold my assent:

The fact that the owner may refuse payment of a sub-contrator's lien until compelled to pay by judicial inquiry, does not relieve the law of its obnovious features, for the reason that the statute gives a a lien for the amount of the laborer's and subcontrator's claim without any contract between him and the owner, and without notice to the owner. The effect of a judicial inquiry could only be to require proof of the amount of the claim. The recovery against the property owner to the full value of the contract price does not depend upon whether he is in default, or has given his consent, or is guilty of tort or neglect, or has knowledge of the failure of the original contractor to pay his liabilities.

If the legislature has the right to make all contracting parties liabie under contracts beyond the amount of the contract price and re-

gardless of the same, such law to be constitutional must rest alike upon all residents of the state, or else it would impose burdens upon one class of citizens which do not belong to all. If the law be valid, then the legislature may render any class or classes liable beyond the amount of their contracts and regardless of the same, while all others would have the liberty of contracting freely as at present.

It is admitted in the opinion in this case in the court below (30 C. C. A. 126) "that the liability of the owner in respect to building contracts is restrained in some degree by this statute" (Ohio mechanic's lien law), but it is claimed that, as the material men put their property and labor into his building they ought to be protected, notwithstanding this obvious violation of the constitutional rights of the owner. While the doctrine has been enunciated in certain classes of cases, we have never before heard that the constitutionality of a law could be made to depend upon the size or amount of its infraction of the fundamental law, or the balancing of rights or wrongs. We have always understood that an infraction of the constitution, however slight, rendered a law unconstitutional. If this is the law, and we are certain it is, then this judgment ought to be reversed upon the reasoning of the Circuit Court of Appeals and no consideration should be given to the equitable claims of the sub-contractors. They knew, or could have known, what the contract with the principal contractor was and the times fixed for his several payments, and there is no claim made that the owner in any way varied from the terms of the contract. If equities are to be considered, why should not the rights of the owner, who has fairly and honestly entered into and strictly fulfilled his contract, be superior to those of sub-contractors and material men, who have recklessly and carelessly furnished labor and material for an insolvent contractor whom they, and not the owner, trusted.

But we do not understand this case is to be decided as between equities, but as between legal rights, for whatever may be written or said about equitable liens, these liens are wholly dependent upon the validity of this statute.

The court below admits that it interferes with and restrains the liberty of contract on the part of the owner (30 C. C. A., 126), and this admission establishes its unconstitutionality as the authorities elsewhere cited in this brief clearly establish.

The case of Weil v. State, 46 O. S., 450, cited by the court below in support of its decision (30 C. C. A., 127), shows, we think, a clear misconception of the effect and purpose of the mechanic's lien law. In the case of Weil v. State the law in question fixed the rights of the parties to a contract and it was rightly held that the parties thereto were subject to the provisions of the statute. In the case at bar the legislature has attempted, and, if the judgment of the court below is sustained, has succeeded in making a contract *for* parties. This statute does not assume to say that the owner and contractor shall be subject to certain restrictions as between themselves, by virtue of their contract, but in effect says to the owner, "although you may fulfill in good faith and to the letter your contract with the contractor, you are still liable to pay for his improvident contracts with people with whom you have had no dealings and do not even know." How this may work out can be made clear from an example: Supposing the contract provides for the construction of a building at a cost of $50,000, but for some reason, when the contractor comes to make his contract, they aggregate $60,000. Under this statute, although every dollar of the $50,000 goes to the subcontractors and the material men, they can still compel the owner to pay them the balance ($10,000), or have his property sold. In other words, this statute will deprive him of his property because of the improvident contracts of somebody else. So far from interfering in some slight degree with the owner's right to contract, as the court below admits, it seems to us utterly to destroy his right to contract and must for this reason be invalid.

The law in question is contrary to the spirit of the constitution, in violation of the great first principles of the social compact and cannot be considered a rightful exercise of legislative authority.

Calder v. Bull., 3 Dall., 386.
Gulf, Colo. & Sante Fe R. R. Co. v. Ellis, 165 U. S., 150.
Wilkinson v. Leland, 2 Pet., 658.
3 Am. & Eng. Ency. of Law, 674.
Osborne v. Nicholson, 13 Wall., 662.
Gunn v. Barry, 15 Wall., 623.

The Ohio court did not interfere with or seek to overthrow the exercise of the legislative discretion. It did not nullify the Act of 1894 on the vague ground that it was opposed to the "latent spirit" supposed to pervade or underly the constitution which neither its terms nor its implication disclose. The same court in Walker v. Cin-

cinnati, 21 O. S., 41, expressly held that the legislative powers must be exercised within the constitutional limitations.

The argument that the lien law was read into and made a part of the contracts of the lien claimants and the Hotel Company was thereby bound, is without merit.

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it never had been passed."
>
> Norton v. Shelby Co., 118 U. S., 442.
> Lion Hardware Co. v. Young, 53 O. S., 423.
> 3rd Am. & Eng. Ency. of Law, 678.
> State v. Lessees of Public Works, 3 Ohio Bull., 265.
> Meyer v. Berlandi, 39 Minn., 438.

An unconstitutional law is void, not from the time it is so declared, but from its enactment.

> Findlay vs. Pendleton, 62 O. S., p. 80-88.

Nor is there merit in the contention that the law is not obnoxious to the constitution and does not deprive the owner of his property without due process of law, because he may require a bond of the original contractor that all claims against the building shall be paid and the owner protected against all loss, cost, damage or expense outside of the original contract price. If the owner should require a bond, he would likely have to pay a higher price for his building. He would be driven to the necessity, in case the contractor defaulted, of bringing suit on the bond and the means suggested would therefore be inadequate to protect the owner against loss. Palmer & Crawford v. Tingle, 54 O. S., 423; 9 O. C. C., 710, 711. If the law is unconstitutional, it could not be rendered valid by the mere fact that the owner could relieve himself by requiring the contractor to give a bond. Bardwell v. Mann, 48 N. W. 1120 (Supreme Court of Minnesota).

> Gibbs vs. Tally, 133 Cal., 373.
> Shaughnessey vs. Surety Co., 71 Pac., 701.
> Snell vs. Bradbury, 73 Pac., 150.

If the contractor defaults, the owner, to recoup himself, must proceed in an action upon the bond and bear the expenses incident to litigation. In Commonwealth v. Perry, 155 Mass., 117, it was held that a statute which provides that "no employer shall impose a fine

upon or withhold the wages, or any part of the wages, of an employe engaged in weaving, for an imperfection that may arise during the process of weaving," is unconstitutional, because if the statute "permit the hiring of weavers only upon terms that prompt payment shall be made of the price of good work, however badly done their work may be, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to every one, when it declares that he has a 'natural, essential and inalienable' right of 'acquiring, possessing and protecting property.' "

A damage suit against the ordinary employe in a factory would too frequently result only in expense to the proprietor.

If it be urged that the owner may defer payment until the building is complete, the answer is that the cost of building will be increased to the owner. Comparatively few contractors are able to carry a building until it is finally completed, and rich contractors would thus monopolize the building business.

Nor is the argument meritorious that the owner may see to the application of payments under the contract. He is not required to become the guardian of laborers and material men, and to use an extraordinary degree of diligence, while none is exacted of them. Moreover, the laborers and sub-contractors are frequently wholly unknown to the owner.

The law is not relieved of its obnoxious features by the fact that the owner may be his own builder. He has a right to employ another to construct his building, which right cannot be legally denied him. The owner's occupation, habits, and tastes would frequently wholly prevent and disqualify him from constructing his own building. There are large classes so situated and so wanting in the qualifications requisite to the proper supervision of a building as to be totally deprived of the privilege of constructing homes for themselves, if compelled to give their personal attention thereto. They would in almost every instance be swindled, because they are unacquainted with the kind and character of work and the cost thereof requisite to the construction of a house.

The Federal Courts should follow the Decisions of the Supreme Court of Ohio, holding the Mechanic's Lien Law Unconstitutional.

The law of 1894 was a radical departure from former mechanic's lien laws of Ohio, which departure the courts refused to ratify. The first general mechanic's lien law of the state was enacted on March 11, 1843, (41 O. L., 66). It embodied every essential feature of the mechanic's lien law of the state in the passage of the Act of 1894. It gave a lien to principal contractors, laborers and sub-contractors, but the lien in every instance was measured by the contract made by the principal contractor with the owner. It was a derivative lien. The sub-contractor was subrogated to the rights of the principal contractor and stood in his shoes. The sub-contractor or laborer was required to file with the owner an attested account of the amount and value of the work and labor performed or material furnished, for which payment had not been made. On receipt of this notice the owner was required to retain subsequent payments due the principal contractor for the benefit of the person or persons filing such attested accounts. The owner was required to serve a copy of such attested account on the principal contractor and if such contractor did not, within ten days after the receipt of a copy of such attested account, give notice of his intention to dispute the claim, or arbitrate or adjust it with the sub-contractor, and if for ten days after the giving of such notice he should neglect or refuse to adjust or arbitrate the same, he was considered as assenting to the demand of the sub-contractor, laborer or material man and the owner was required to pay the account if he owed the original contractor a sum equal thereto. The person entitled to a lien was also required to file an account with the recorder of the county in which the improvement was made, showing the items of labor, material or machinery furnished, which account was to be recorded in a book kept for that purpose. The lien continued for two years and was enforcible by appropriate legal proceedings. A principal contractor, desiring a lien, was also required to file his attested account with the owner and also with the recorder. The significant provisions of the law were two:

First: The law provided for *notice* to the owner in all cases and notice to both the owner and principal contractor in case sub-contractors or laborers sought to acquire liens.

Second: The sub-contractor, laborer and material men were subrogated to the rights of the principal contractor.

From time to time modifications were made to the law of 1843, as on May 1, 1871, 68 O. L., p. 107. When the statutes were codified in 1880, the law as it had existed was carried forward into the Revised Statutes and remained unchanged as to the foregoing features until the enactment of the law of 1894. Among the changes made in the early legislations of Ohio was the provision that the sub-contractor by taking appropriate steps might not merely stop the funds due the principal contractor in the hands of the owner, but might acquire a lien upon the property of the owner itself.

A partial historical summary of the mechanic's lien legislation in Ohio is given by Judge Granger in his dissenting opinion in Smith Bridge Co. v. Bowman, 43 O. S., 37.

See also Rockel & White, Ohio Lien Laws, 47, 50.
Treadway & Marlatt's Ohio Mechanic's Lien Law, Chap. 1.

The Supreme Court of Ohio announced the doctrine as to mechanic's liens about 64 years ago in the case of Hampson v. State, 8 O. S., 321, 322, wherein HITCHCOCK, J., said:

> "A contracts with B to build for him a house of specified dimensions, and for a specified price. B contracts with C to do the whole or a part of the work, likewise at a specified price, and at a price less than that which he himself is to receive from A as the work progresses. A, from time to time, makes payments to B, according to his contract, and when the work is completed, pays him off in full. Afterwards it is found, however, that B has not fully paid C who has done the work, or a part of it, and C files his bill, or commences his action against A, claiming payment from him for his labor, on the ground that 'the laborer is worthy of his hire,' and that A has been benefited by his (C's) labor. True, when he performed his labor, he did it, not for, or on, the credit of A. With him he had no contract; his contract was with B, and so far as he has received payment, it has been from the hands of B. But still, inasmuch as the house, when completed, is the house of A, and is of some benefit to him, he insists that, although A has once paid for this house, he shall pay for it again. What court would, for a moment, entertain such a claim? What lawyer would commence such a suit?"

The law, as thus announced, has been maintained by an unbroken line of decisions. In Ohio the sub-contractor's position is much the

same as that of the party who garnishees another in an attachment proceeding, for as said in Copeland v. Manton, 22 O. S., 398, 403, 404, construing the Act of 1843:

> "It seems to be the policy of the act to confer upon the sub-contractor only the right to be subrogated to the claims of the contractor, under his contract with the owner, at the time the requisite notice is given. If, therefore, the contractor has *then* no claim against the owner, or there are no more payments due or to be made to *him*, the act does not in terms or effect bind the owner to retain anything for the benefit of the sub-contractor, and he obtains no lien on the amount the owner is bound in law and equity to pay to another.
>
> The position of the sub-contractors in this respect is much the same as if they had garnisheed the owner by proceeding in attachment. Both forms of proceeding are statutory remedies to subject a claim due to a debtor to the payment of his debt, and whenever available are, in effect, substantially alike. It is a fundamental principle that an attaching creditor can stand on no better footing, as against *bona fide* purchasers, or assignees of his debtor, than the latter does at the time of the attachment or garnishment."

So in the case of Dunn v. Rankin, 27 O. S., 132, it was held that "where independent jobs are let under separate contracts, though between the same owner and contractor, the liens of the sub-contractors are respectively confined to the amount unpaid on the particular contract each one aided the contractor to perform."

In the well considered case of Bullock v. Horn, 44 O. S., 420, 424, in passing on the rights of sub-contractors, SPEAR, Judge, said:

> "In giving a construction to this statute, by fair inference it may be assumed that the rights of the workman and material man, as against the owner, are based upon the latter's contract with the contractor, and while they are subordinate to the contract, and are to be worked out through it, those parties have the right to rest in security upon it and the means provided by law to secure its application to their demands. In the absence of fraud they are presumed to have notice of the terms of the original contract. Hence, if the original contract showed that payment had been made in advance to the contractor, or if it contemplated the allowance, by the contractor, of set-off then held or to be acquired by the owner as payment, such provisions would bind the workmen and material men, as they would be held to have accepted employment of the contractor with an implied assent to such terms."

When the Supreme Court of Ohio was called upon to determine the validity of the Act of 1894, in the case of Palmer & Crawford v. Tingle, 54 O. S., 423, it refused to depart from the uniform doctrine theretofore announced, and again held that all to whom the contractor becomes indebted in the performance of his contract, are bound by the terms of the contract between him and the owner, and that a direct and independent lien on the property of the owner to sub-contractors and those who furnished material or labor is unconstitutional and void.

The same principle has been announced in more recent decisions, as in Stark v. Simmons, 54 O. S., 435, and Mack v. DeGraff & Roberts' Quarries, 57 O. S., 463. There has been no change in the state of decisions on the question of mechanic's liens within the history of the state.

The lien claimants, therefore, now contesting with the hotel company, were each bound to take notice of the state of decisions in Ohio and of the uniform policy of the state on the question of mechanic's liens. The history of legislation in the state and the expositions of the law emanating from the Supreme Court were a warning to the lien claimants that the law of 1894 would be overthrown by the Supreme Court.

It was expressly held in this case in the Circuit Court of Appeals (30 C. C. A., 112), that there had been no change of judicial decision upon the subject of the mechanic's lien law in the state of Ohio, and therefore the case did not fall within the rulings in Douglas vs. Pike County, 101 U. S., 677.

As to the effect of prior decisions SAGE, J., says, 79 Fed. Rep., 483: "This case arises, not under a change of decisions, but an amendment of the statute and to apply the doctrine of Douglas v. Pike Co., 101 U. S., 677, to such a case 'would extend the rule laid down in that case beyond all precedent.'"

3d Syllabus (79 Fed. Rep., 478): "The rule that, where there are conflicting decisions as to the construction or validity of a state statute, the early decisions will be followed by the federal courts as to all rights accruing under them before the last decision, has no application where the later decision is under an amendment of the statute, constituting it a radical departure from previous legislation."

In the construtcion of the statutes and laws of the state, the general principle is that the judicial department of the state is the appropriate

organ for this purpose and that decisions of the highest courts of the state construing its statutes are binding on the Federal courts, although they may have put a different construction on them. "This rule that the Federal courts follow state decisions as to state laws and rights under them is almost invariable. Brannon on 14th Amendment, 397. "For the sake of harmony and to avoid confusion, the courts of the United States will lean toward an agreement of views with the state courts if the question seems to be balanced in doubt." Burgess v. Seligman, 107 U. S., 20. "And if the Federal court be bound by the interpretation of the Ohio statute by the State Court, it need not review the reason by which that interpretation was reached." New York Life Ins. Co. v. Cravens, 178 U. S., 389, 395.

The decision of the Supreme Court of Ohio, is founded on reason and authority, but were the Federal court to conclude otherwise, it would be immaterial, for as Justice Brewer said in Forsyth v. Hammond, 166 U. S., 518, "The construction by the courts of the state of its constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the Supreme Court of a state has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgment. That court is the final arbiter as to that question."

Mr. Justice Harlan in O'Brien v. Wheelock, 95 Fed. Rep., 883, sitting in the Seventh Circuit Court of Appeals, defined the attitude of the Federal Courts on pages 904 and 905 in the following language:

> "In other words, as the Act of 1871 had not been construed by the Supreme Court of Illinois when the bonds held by the plaintiff were issued, it is the province and duty of this court to exercise an independent judgment as to its validity under the constitution of Illinois; but in doing this there are two principles that should not be overlooked: (1) that, although the act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiff were proved, this court should give effect to any ruling or construction that may have been previously established by the highest court of the state in interpreting similar provisions in the constitution of 1848; (2) that the Federal courts for the sake of harmony and to avoid confusion, should 'lean toward an agreement of views with the state courts, if the question seems to them balanced with doubt,' and endeavor to 'avoid any unseemly conflict with the well considered decisions of the state courts' upon questions of local law."

The above case presented a state of facts somewhat parallel to those now before the court. Should the court not follow in the wake of the Ohio decisions, then there will be one rule for Ohio creditors, and another for those residents of another state, i. e., claimants for mechanic's liens who are residents of states other than Ohio will have a valid lien, while lien claimants residing in Ohio will not have such, and, as held in Jencks v Quidwick Co., 135 U. S., 457, this "would be unfortunate, to say the least."

The matter in controversy is one peculiarly within the domain of state control. It is of a local nature, in which the nation, as a whole, is not interested, and in which, by the very nature of things, the determination of the state authorities should be accepted as authoritative and controlling. It is a matter of local and non-federal concern. Every state, perhaps, has enacted a mechanic's lien law. There is great diversity in the provisions of such laws. These laws are not extra territorial in their operation. The Ohio law in question is as peculiarly local as is a statute of limitations, or a law governing voluntary assignments for the benefit of creditors, or a law in relation to fraudulent conveyances, usury, marriage contracts, or recording acts. Laws have been enacted on these several subjects by all of the states, and the decisions of the state courts on such subjects are recognized as binding on the Federal courts and are followed by them.

In Knapp, Stout & Co. v. McCafferty, 177 U. S., 638, a lien was asserted for the towing of a raft. The lien for towage was likened to that of a common carrier. The Supreme Court of Illinois held that under the laws of that state the plaintiff had a possessory lien for the entire bill upon the raft that had been towed, to the extent that it remained in the plaintiff's possession. The Supreme Court held that whatever its opinion might be, it should defer to the opinion of the state court, as the question was a local one depending upon the law of that state. The Supreme Court expressed a doubt as to whether a bill in equity lies to enforce a possessory lien, but inasmuch as the Illinois court recognized such a practice, the Supreme Court also recognized it as expressive of a local law. There was no special statutory provision in Illinois for the enforcement of the lien, but the Federal court recognized and enforced the practice of the state courts. If the law governing such a case and lien is local, it is difficult to see why a mechanic's lien law like that of Ohio is not also local in its nature.

Mr. Justice Miller in Bucher v. Cheshire, 125 U. S., 555, said: "It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or have always been a part of the law of the state, that the decisions upon the subject are usually conclusive and always entitled to the highest respect by the Federal courts. * * * Where such local law or custom has been established by repeated decisions of the highest courts in the state, it becomes also the law governing the courts of the United States sitting in that state." The laws of the several states include state constitutions, statutes, common law, and decisions expounding them. Brannon on the 14th Amendment, 393; Bucher v. Cheshire, 125 U. S., 582. In ordinary cases the decisions of the highest courts of the state with regard to the validity of one of its statutes is binding on the Federal courts. McGahey v. State of Virginia, 135 U. S., 665, 667.

If the previous decisions of the state court are so firmly established as to constitute a rule of property, then the Federal courts are governed by the previous decisions of the state courts.

Louisville v. Palmes, 109 U. S., 244.

> "The public policy of a state may be deemed to be authoritatively declared by its courts. Their evidence we cannot oppose by speculations or views of our own. Nor can such in[illegible]s and policy be changed by the contract of parties. Against them no intention will be inferred or permitted to be enforced."
>
> New York Life Ins. Co. v. Cravens, 178 U. S., 398.

It will be claimed that a large number of states have held mechanic's lien laws similar to, or embracing the same principles as, the Ohio mechanic's law, to be constitutional; but such a fact is of no consequence in the determination of this case. For instance, the statute of limitations of Nebraska and Kansas were precisely similar. The Kansas court by a uniform series of decisions, extending over a period of twenty years, held that the temporary absence of the debtor, even if he retained a residence within the state at which process against him might be served, was sufficient to take the case out of the statute. The Nebraska court held that the provisions of its precisely similar law did not include the case of a debtor temporarily absent from the state and having a usual place of residence therein at which a summons on him might be served. In a case arising under this

statute in Kansas this court said: "But what may be the law of Nebraska is immaterial. The case at bar is governed by the laws of Kansas, and the duty of the court to follow, as a rule of decision, the settled construction of the highest court of Kansas of a statute of that state, is not affected by the adoption of a different construction of a similar statute in Nebraska or any other state."

Bauserman v. Blunt, 147 U. S., 547.

If there are different interpretations in different states to a local law, that law in effect becomes by the interpretation, so far as it is a rule for action in the Federal courts, a different law in one state from what it is in another.

Union Nat'l. Bank v. Bank of Kansas City, 136 U. S., 223.

Mr. Justice Field in Louisiana v. Pilsbury, 105 U. S., 294, held that: "When a statute of two states, expressed in the same terms, is construed differently by their highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it, in all cases arising under it." To the same effect is Morley v. Lake Shore & Michigan S. Ry. Co., 146 U. S., 162.

It was said by Judge Lurton, 86 Fed. Rep., 370, when this case was originally before this court, that the question involved is one of general law. We entertain a different opinion from the learned judge, but if he be correct, if the state statute does not violate a provision of the federal constitution, "Federal courts are not justified in running counter to the decisions of the highest court upon questions involving the construction of state statutes or constitution, on any alleged ground that such decisions are in conflict with sound principles of general constitutinal law."

Fahlbrook Irrigation District v. Bradley, 164 U. S., 112.

It may be said that there is not an unbroken line of decisions in Ohio, such as we have indicated, but that the Supreme Court in Railway Co. v. Cronin, 38 O. S., 122, and Railway Co. v. McCoy, 42 O. S., 251, held liens good under a law somewhat similar to the Act of 1894. Those cases were decided under the Act of March 31, 1874, (71 O. L., 51). The answer to this argument is that the Act was an entirely different law from that of 1894, and that the constitutionality of the law was not involved in either of those cases. Courts

do not pass on the constitutionality of laws unless the issue be made by the pleadings.

John Spry Lumber Co. v. Sault Sav. Bank & Trust Co., 77 Mich., 199.
Cooley's Constitutional Limitations, 3rd Ed., Sec. 163.
Also see Ohio cases.

An examination of the two Ohio cases last mentioned discloses that the principal contractor had not been paid. Notice to the property owner, under the law in question in them, was an essential prerequisite to the procurement of a lien. The Act of 1874 provided that if the indebtedness of the contractor or sub-contractor for labor and materials exceeded ninety per cent, of the contract price for such labor and materials in the contract between the owner of the road and the original contractor, then the owner of the road should pay to each person performing labor or furnishing materials such a per cent. of their claims as ninety per cent. of the first contract price for said labor and materials is of the aggregate amount unpaid of the indebtedness for said labor and materials. This provision alone made the law radically different from that of 1894.

The act of 1874 further provided that the contract between the owner of the road and the original contractor should provide that the labor performed and materials furnished should be paid according to the provisions of the Act by the company to the persons to whom sums were due before anything was paid to the original contractor.

These provisions really required the original contractor to give the owner of the road a list of all of his sub-contractors and laborers and the sum due or to become due to each. This is the spirit of Sec. 2 of the Act, which required that at least five days notice should be given to each contractor or sub-contractor of the time the owner of the road would make payment, and then follows a provision that in case of dispute the owner of the road should hold all funds until the controversy was determined.

The two Ohio cases last mentioned were not decided under the present law, which is an amendment to all previously existing laws. The present case, as was held by Judge Sage, arises under an amended or new law, and not a change of decisions.

Our Contention is that this is a cause in which the State Constitutional and Statutory Law of Ohio should be Applied to a Controversy about Mechanic's Liens; that the State Courts are the final Adjudicators of Questions touching the Interpretation of such Laws; and that the United States Courts are required, by their own rules, to Administer those Laws, in this case, just as the State Courts have done it.

The United States Courts have jurisdiction of this cause, not because of the subject matter of the controversy, but only because of the character of the parties—their diverse citizenship.

There would be no harmony and no uniformity in the operation of state laws, if the United States courts should refuse to abide by the decision of the state courts upon questions like those which are to be adjudicated in this cause.

The decision of the question of the constitutionality of the mechanic's lien law is not controlled by the Constitution, laws or treaties of the United States; nor is it a question of general law or commercial law, such as the law about negotiable paper, insurance and the like; nor is it a question to be controlled by principles of general jurisprudence, of national and universal application.

The question which the Supreme Court of Ohio decided in Palmer & Crowford vs. Tingle, and in Young vs. Hardware Company, *supra*, was purely one of state constitutional and local law.

The Constitution of the state, by its bill of rights, guarantees to every citizen of the state the right to enjoy liberty, and to acquire, possess and protect property. By a number of decisions of high and commanding authority it has been adjudged that the right to make contracts is embraced in this constitutional guaranty. For one of the means of acquiring property is by, and through, contracts.

Section 1, Article 1, of the Constitution is as follows:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

The principle that a person has a right to make his own contracts is, likewise, one that savors of natural justice, which is anterior to all written constitutions. Judicial judgments which limit the operation of such a principle of natural justice, ought to be expressed in the

most definite and unmistakable terms, even in the absence of a constitutional restraint.

The law can *create* contracts for a person in only a small number of instances. It may be done where a duty is cast by statute, or equity, or good conscience, or, in any way, by the law, upon a person. It may be done where one has been benefited by another who is discharging such a duty, and where one has knowingly accepted something of value from another. In these instances, and only in these instances, can the law, the legislative authority, make a contract for a person.

The Ohio Legislature, in 1894, amended the mechanic's lien statute. Separated from its parts that are irrelevant to this discussion, it conferred upon one who had done work upon, or furnished materials for, a building, pursuant to a contract with another, who had contracted with the owner to erect it, a lien for the price of his work and materials, upon the building and land. The statute bestows that right upon the sub-contractor, not only when the owner had not given his consent to it, but also when he had no knowledge whatever of it. The statute does not limit the right to the lien to instances in which the owner stood by and saw, and knew, that the sub-contractor was doing the work or furnishing the material for the benefit of his building.

The theory that the owner makes the head contractor his agent by making a contract with him for the erection of a building—an agent invested with irrevocable power, to bind the owner by contracts made with the sub-contractors—carries the doctrine or fiction of construction to an unreasonable and unjust limit. As a mode of constructing contracts for persons, without their consent or knowledge, it is almost as unreasonable as the Eiglish doctrine of constructive treason. It exemplifies how easy even judges are misled by fiction.

The Ohio Supreme Court, after mature deliberation, in the cases cited, adjudged that this statute was an invasion and violation of the constitutional guaranty of the right to acquire and possess property and make contracts. That court did not base its decision on the ground that the statute was unjust, burdensome, inequitable or contrary to economic principles, but on the ground that it contravened a constitutional right created by the state constitution.

The Question whether the Statute Violated the Constitutional Guaranty is a Legal Question. It cannot be tortured into a question of General Law or of General Jurisprudence, of National or Universal Application.

It has been claimed and argued that the rights which the Supreme Court of Ohio held were violated by the mechanic's lien statute, "are fundamental, and under the terms of popular and constitutional government, and like declarations, are to be found in all, or most, of the state constitutions."

It is true that, probably, every state constitution has a parallel provision to that quoted from the Ohio constitution, a guaranty of liberty, of the right to acquire and possess property, and to have it protected by law. If the test of a general law is that its counterpart is found in all, or a mojority, of the state constitutions, or, in the statutory law of all or a majority of the states; if the doctrine in regard to the exercise of independent judgment by the United States courts is to be extended, so that they may decide all questions that may be raised about such laws, independently of the state decisions—we respectfully submit that there will be very few questions left for the state courts to decide.

Why should the fact that other state constitutions, or the statute law of other states, have a similar provision, make the question one of general law? Why should this fact, and the further fact, if it were true that other state courts have decided the same question arising upon such a provision, differently, withdraw the question from the category of constitutional and statutory questions of a local character?

Previous to the decision of this court in 86 Federal Reporter, 370, there is no case reported in which either a Federal or a state court placed a different construction from that of the Supreme Court of Ohio, upon the same or an identcal constitutional guaranty.

In Jencks vs. Quidnick Co., 135 U. S., 457, the Supreme Court considered and decided a question somewhat analogous to the one just propounded. We quote from the opinion to disclose its scope:

"So when the highest court of the state affirms that a conveyance made by a debtor to a trustee for the benefit of creditors is valid, under the statutes of that state, we should, ordinarily, in any case involving the validity of such conveyance, follow that ruling, *even*

though that statute was common to many states, and in others, a different ruling had obtained."

There is a statute of descent in every state; there is a statute of frauds in every state; there is a statute of fraudulent conveyances in every state; but questions arising under such statutes are not, for that reason, questions of general law.

We respectfully invite the court's consideration of another view.

In Railroad Co. vs. Bank, 102 U. S., 57, Justice Clifford said that the positive statutes of states and the interpretations of the same by their own tribunals, *including rights and titles to things having a permanent locality, such as real property, furnished rules of decisions in Federal courts.*

The complainant in the cause at bar claims rights of a special nature over the real estate of The Great Southern Fire-Proof Hotel Company—a lien over its hotel building. The right which they claim is a right over real property. It was this kind of a right that the Ohio Supreme Court passed upon in the two cases in which the law was overthrown. The question which they decided was not about the construction of a contract or other commercial instrument. It was about a right to a thing having a permanent locality in the State of Ohio.

The right which the complainant claims is not a fundamental right; it is not a right secured to them by the common law.

In Van Stone vs. Stillwell and Bierce Mfg. Co., 142 U. S., 128, the Supreme Court of the United States declared that a mechanic's lien on real property is wholly a creature of statute; that it is not created by the contract between the parties.

At common law there are no common law liens of any kind upon real property. Equity raises a vendor's and grantor's lien for the purchase money, and that is all. Hence, a question about a mechanic's lien upon real property, a right to a thing having a permanent locality in a state, is not a question of general law, but of local law.

In DeVaughn vs. Hutchinson, 165 U. S., 566, the Supreme Court of the United States declared that it was a principle firmly established that, to the law of the state in which the land is, we must look for the rules which govern its descent, alienation and transfer, and the construction of wills and other conveyances.

Our answer, then, to the contention of opposite counsel, is that it is a falacy to assume that the question decided by the Supreme

Court of Ohio in the two cases cited, was one of general law; that, on the contrary, it was a question of local law; (1) because the Supreme Court construed and interpreted a constitutional provision and a state statute; and (2) because the statute in question and passed upon, was a law in regard to alleged rights to a thing having a permanent locality in the state—in short, it was a law concerning real property.

The Supreme Court of the United States, as intimated in several cases, has, in effect, decided that when even some matters of General Law are Regulated by State Statute, the Federal Courts will follow the Decisions of the State Courts Construing the Statute. If it is regulated by the State Constitution, there would be equal truth in the proposition.

In Hough vs. Railway Co., 100 U. S., 213, Justice Harlan stated the question before the court in this language:

"Be this as it may, the questions before us, *in the absence of statutory regulations by the state in which the cause of action arose*, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts."

In Lake Shore & M. S. Ry. Co. vs. Prentice, 147 U. S., 101, Justice GRAY said:

"This question is not one of local law, but of general jurisprudence, on which this court, *in the absence of express statute*, regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."

In B. & O. Ry. Co. vs. Baugh, 149 U. S., 368, Justice BREWER employed similar language, thus:

"But, passing beyond the matter of authority, the question is essentially one of general law. *It does not depend upon any statute;* * * * There is no question as to the power of the states to legislate and change the rules of the common law in this respect, as in others, *but in the absence of such legislation the question* is one determinable only by the general principles of that law."

The obvious converse of these judicial utterances is, that if a statute regulating the matters out of which the question grew had been in force in the several states, the Supreme Court would have followed the decisions of the state courts, unless some of the other exceptions

existed which were enumerated in the opinion rendered in Burgess vs. Seligman.

In Burgess vs. Seligman, 107 U. S., 20, is found the criterion by which it can be ascertained when the Federal courts should adopt and follow the decisions of the state courts, and when they will exercise their own independent judgment. We are willing to stand upon, and be concluded by, the decision in that case.

"Since the ordinary administration of the law," it is there said, "is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. *This is especially true in regard to the law of real estate and the construction of state constitutions and statutes.* Such established rules are always regarded by the Federal courts, no less than by the state courts, as authoritative declarations of what the law is."

In that case it was further said:

"So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

The dimensions of this decision cannot be extended beyond the plain meaning of these words.

Our opponents will probably endeavor to enlist Olcott vs. Supervisors, 16 Wall., 678, in support of their view, that the question decided in Young vs. Hardware Co., by the Supreme Court of Ohio, was neither a local question, nor one respecting the construction of the Ohio Constitution. A careful analysis of that case, however, will make it obvious that the decision does not help them. The court gave as the reason why no question of local law was decided by the State court, that it was not a question of interpretation or construction; that the meaning of no provision of the State Constitution or State statute was considered or construed by the State court. The question which was decided was in regard to the nature of taxation, what uses were public, and what were private, and the extent of unrestricted legislative power. The decision of that question did not, of course, involve, or require, an ascertainment of the meaning of any consti-

tutional provision, as the United States Supreme Court declared; nor did the Supreme Court of Wisconsin pretend that it determined the meaning of any constitutional enactment.

That case cannot, on logical principles, be assimilated to the causes under discussion. In Young vs. Hardware Company, the Supreme Court of Ohio decided a question of interpretation and construction. That court distinctly avowed that the statute creating the lien in favor of the sub-contractors was an infringement upon the constitutional guaranty of the right to acquire and possess property. That conclusion was not based upon some invisible constitutional spirit or purpose, or temperament; but the particular provision of the Constitution that was violated was specified. The court attached a meaning to that particular provision. It was interpreted, it was construed, by the court.

The fact that other state constitutions contain similar or identical provisions, does not withdraw the question which the court decided from the category of constitutional or local questions.

Two different state constitutions of the states of A and B may contain exactly the same provisions, the language of each being identical. The Supreme Court of A may fasten one construction upon it; the Supreme Court of B may construe it as meaning something else, radically different. Both decisions, we will assume, were rendered before a United States court was called upon to decide the same question in the state of A. Would the United States court follow the adjudication of the Supreme Court of the state of A, or of the Supreme Court of the state of B? We submit that this question is answered by what the United States Supreme Court said in Jencks vs. Quidnick Co., *supra.*

The United States Court should decide the question just as the Supreme Court of A state did, notwithstanding the constitutional provision construed *"was common to many states, and in others a different ruling had obtained."*

We insist that the decision of the United States Supreme Court in Burgess vs. Seligman, *supra,* does not sustain the contention of opposite counsel.

The Supreme Court of Missouri did not render its decision, until after the United States Supreme Court determined Burgess vs. Seligman, pages 32 and 33, 107 U. S.

The Supreme Court of Ohio Decided Palmer & Crawford vs. Tingle and Young vs. Hardware Company, supra, before these causes, now being argued before this Court, came into the United States Circuit Court.

The decision in Burgess vs. Seligman must be interpreted and limited by the facts in the case.

True, the transaction between the parties in Burgess vs. Seligman occurred before there was any settled construction of the statute of Missouri by the State court; but the Supreme Court of the United States did not place any stress upon that fact; the fact that the United States Circuit Court rendered its decision before the State court passed upon "the identical transaction" was the relevant master fact —the fact which controlled the decision of the court.

Nor was the diverse state citizenship of the two parties commented upon at all.

Why should there be a different Rule for a Case in which the parties are citizens of the same State, and a Case in which the parties are citizens of different States?

The Circuit Court had, and this court now has, jurisdiction over these causes, because the parties hereto are citizens of different states. There is no Federal question to be decided. The Federal jurisdiction is not exclusive, but concurrent with that exercised by the State courts. The subject of the mechanics lien statute is not a matter of Federal control. The law to be administered is not the law of the United States, but it is the law of the State of Ohio.

In Polk's Lessee vs. Wendell, 5 Wheat., 293, by JUSTICE JOHNSON, it was said:

"The sole object for which jurisdiction of cases between citizens of different states is vested in the courts of the United States is to secure to all the administration of justice, upon the same principles on which it is administered between citizens of the same state. Hence, this court has never hesitated to conform to the settled doctrines of the states *on landed property, where they are fixed*, and can be satisfactorily ascertained; nor would it ever be led to deviate from them, in any case that bore the semblance of impartial justice."

In the case of Palmer & Crawford vs. Tingle, and Young vs. Hardware Company, *supra*, the privilege and immunity of the citizens of

Ohio, who were parties to said causes, was to have a just application of the law of Ohio to their cases; and to carry out the purposes of the United States Constitution in granting jurisdiction over the causes now before this court to the United States courts, the citizens of Pennsylvania (Jones and Laughlins, Limited), are entitled to nothing more, and nothing less, but precisely the same. That is to say, they are entitled to have justice, the law of Ohio, administered to them upon the same principles upon which it was administered between the citizens of the State of Ohio in the two cases decided by the Supreme Court of Ohio.

The object of granting jurisdiction to the Federal courts where the parties are of diverse citizenship, is to put the citizens of different states upon an equality; but an expansion of the jurisdiction, such as is contended for by counsel for the other side, which would favor the citizens of other states (Pennsylvania), above the citizens of the State of Ohio, would be a mischief of the same degree and character as where a citizen of the State of Ohio should receive the benefit of the local bias of his own state court.

The Constitution of the United States leaves the people of the several states and their constitutions and laws, supreme, especially in the field of personal liberty. The people of each state having the power immediately in their own hands, are trusted to protect their own rights, in their own way. "In the sanctum sanctorum of the political temple, where liberty must either live or die, there should be no exterior control."

The jurisdiction conferred upon the Federal courts upon the ground of diversity of citizenship was not intended to impeach the spirit nor to invade the authority of the people of the states in this respect.

In some of the state conventions of the original thirteen states, it was contended that the Constitution would have that effect, and if they had not been convinced that that was not the correct interpretation of it, it would never have been ratified. In the Virginia convention, for instance, this contention was strenuously urged, when John Marshall silenced the objection by assuring the convention that the proper construction of the provision on that subject was, that even contracts were to be construed by the law of the state in which they were made.

The Supreme Court of the United States, in the case of Jencks vs. Quidnick Co., already twice cited, expressed this idea and sentiment when it said: "It would be unfortunate, to say the least, *to have this conveyance sustained as to home creditors and to void it as to foreign.*"

Is this not equally true of the parties to the cause now before this court, and of the parties in the two causes that were decided by the Supreme Court of Ohio? Would it not be "unfortunate, to say the least," to have the mechanic's lien law subverted, overthrown, as to home creditors, and sustained as to foreign creditors?

No case ought to be a controlling authority in the present controversy, as to the construction of the provision in the Ohio Bill of Rights, unless its facts were substantially identical with those before the Ohio Supreme Court. It should not be an influential authority, unless the constitutional provision construed was identical with the one that was before the Supreme Court of Ohio for interpretation.

The decision of the Ohio Supreme Court in the cases cited was rendered before the cause was instituted against The Great Southern Fire Proof Hotel Company by Jones & Laughlins. It was rendered before any United States court was called upon to decide the same question which it decided.

We concede that the United States Supreme Court has decided that the United States Courts are not obliged to conform their decisions to the last decision of the highest state court, when contracts have been made and rights have accrued thereon, on the faith of a prior contrary adjudication of the same court.

But there is no such element in the cause at bar. The Circuit Court of Appeals in deciding the case before, conceded that the contracts of Jones & Laughlins with McClain, did not belong to that category of contracts. Judge Lurton's opinion on this subject is explicit. He said:

"There has, therefore, been no such change of opinion by the Supreme Court of Ohio, as to bring into operation the rule that the rights of the parties are to be determined according to law as it had been judicially declared when the contract was made." (Page 374.)

We concede that the United States Supreme Court has decided that, when the state courts have not yet interpreted a state law, and contracts and transactions have been entered into by, and rights have

accrued thereon to non-residents, the United States courts may adopt their own interpretation of the law, and are not obliged to imitate a decision of the state courts rendered after such rights have accrued. But, even in such an instance, the same court has further declared that it is the duty of the Federal courts to incline, "to lean," to an agreement with the subsequent decision of the state court, *unless such a course would "operate as an absolute denial of justice."*

We submit that this rule should not be applied in cases which involve only a construction of law, or a state constitution or statute, as in the case at bar.

The amended bill of complaint of Jones & Laughlins does not disclose that there would be an absolute denial of justice to them, if the United tates courts should follow the decision of the Supreme Court of Ohio. There is no showing that their claims could not be collected by law from McClain, without relying upon the lien.

And there is another Consideration which we submit is Decisive of the Controversy in this Case. This is a Cause in which the Complainant below, not only did not enter into a contract, and did not acquire rights pursuant to a contract, under a particular state of decisions rendered by the State Courts, but it is also a Cause in which Complainants were warned and admonished, by prior decisions of the Supreme Court of Ohio, that the Liens which they now assert would not be Upheld. Before they made their Contract with McClain, the highest Court of the State had rendered several decisions which gave them that warning or admonition. They were decisions which foreshadowed that the State Supreme Court would pronounce such a Statute, as that under which they now assert Liens, to be Unconstitutional, if it should prove loyal to its previous judicial utterances on similar or cognate questions.

We do not mean by this that the Ohio Supreme Court previously construed statutes exactly identical with the one in controversy. We are not obliged to prove such a condition of the law in order to make it manifest that the Ohio Supreme Court had, "by a course of decisions," established a rule of action, "which it would be wrong to disturb."

It is enough if the history of its decisions discloses that it rendered such decisions on similar laws, statutes or questions.

As early as 1838, in Hampson & Parkison vs. State of Ohio, 8 O., 315, the Ohio Supreme Court declared in words of no uncertain sound, what would be the decision of that court of a question like the one now under consideration. We quote a paragraph from the opinion, on page 321, which states a hypothetical case:

"A contracts with B to build for him a house of specified dimensions, and for a specified price. B contracts with C to do the whole, or part of, the work, likewise at a specified price, and at a price less than that which he himself is to receive from A as the work progresses. A, from time to time, makes payments to B, according to his contract, and when the work is completed, pays him off in full. Afterward it was found, however, that B has not fully paid C, who has done the work, or part of it, and C files his bill, or commences his action against A, claiming payment from him for his labor, on the ground 'that the laborer is worthy of his hire,' *and that A has been benefited by his (C's) labor.* True, when he performed this labor, he did it, not for, or on, the credit of A. *With him he had no contract; with him he kept no account;* his contract is with B; and so far as he has received payment, it has been from the hands of B. But still, inasmuch as the house, when completed, is the house of A, *and is of some benefit to him,* he insists that, although A has once paid for his house, he shall pay for it again. *What court would for a moment entertain such a claim? What lawyer would commence such a suit?"* And then it was added: *"Still the case before the court is precisely the same in principle as this hypothetical case."*

In the context of the opinion the court stigmatizes the claim that was made in the case, and which it declared was precisely the same in principle as the one in the hypothetical case, and which is precisely the same as the claims made by the complainant in the cause at bar, as unjust; and the court also declared, in unambiguous language, that to compel the owner of property, who had erected a building upon it, to pay the contract price, first, to the contractor; second, to pay it over again to the sub-contractor; and third, to pay it over again to the manual operatives, would not subserve the ends of justice. (Page 323.)

This is a perfect photograph of the statute which we are now challenging. The Supreme Court of Ohio, it is true, in the case just cited, did not proclaim, in express terms, by its decision, that such a statute would be set aside as unconstitutional, but it plainly indicated that that would be the result.

By several prior mechanics' lien statutes, and by a number of decisions of the Ohio Supreme Court, which are cited and discussed in this brief, sub-contractors were compelled to acquire their liens in subordination to the contract between the owner and chief contractor; they were also, by such statutes and decisions assimilated to attaching creditors; they were also required to know what were the terms and conditions of the contract between the owner and chief contractor; and their liens were, therefore, confined to the derivative class.

This history of the law making and law expounding in Ohio, on the subject of sub-contractors' liens, should have admonished the complainant that such a statute as the one under consideration would not receive the approval of the Supreme Court, and that it would be pronounced unconstitutional.

In support of our contention, that it is sufficient, if we have proved that prior to the execution of the contract between the complainants on the one side, and McClain on the other, the Supreme Court of the state had construed a similar statute, and that it was not incumbent upon us to prove that the same court had construed the exact mechanics lien statute which is now under consideration and discussion, we invite the court's attention to the case of O'Brien vs. Whelock, 95 Federal Reporter, 883, in which the opinion was delivered by Justice Harlan. The question involved in that case related to the validity of a drain and ditch statute, and to the assessment levied for the purpose of constructing such a drain and ditch.

In the first paragraph of the syllabus the Circuit Court of Appeals expressed itself in this significant language:

"While the Federal courts, in causes in their jurisdiction involving rights arising under state statutes which had not at the time received an authorative construction by the State courts, or the validity of which had not been adjudicated, are not bound to follow a subsequent state decision as to such construction or validity, yet, in exercising its independent judgment thereon, a Federal court should give effect to rules of construction which had previously been established by the highest court of the state, and should also lean towards an agreement of views with the State court, and not act upon a different view, unless compelled to do so, *to prevent an absolute denial of justice.*"

It was contended in that case that, *as the bonds in question were issued before the State Supreme Court had rendered any decisions,*

it was both the province and duty of the Federal court to determine for itself the constitutionality of the Illinois statute, and that it should exercise its independent judgment, no matter what may have been the views expressed by the highest court of Illinois upon that question, and Burgess vs. Seligman, *supra,* was cited. After quoting from that case, and after conceding that the Federal court might exercise its independent judgment, Justice HARLAN observed:

"But in doing this there are two principles that should not be overlooked: (1) That, although the act of 1871 may not have been expressly the subject of judicial construction before the rights of the plaintiff accrued, *this court should give effect to any rules of construction that may have been previously established by the highest court of the state when interpreting similar provisions in the Constitution of 1848;* (2) that the Federal courts for the sake of harmony and to avoid confusion, should "lean towards an agreement of views with the State courts, if the question seemed to them balanced with doubt," *and endeavor to avoid "any unseemly conflict with the well considered decisions of the State courts upon questions of local law."*

We insist that these causes now in discussion should be decided by this court, in obedience to the rule announced in the case just cited.

Anterior to the execution of the alleged contracts between the original complainant and McClain, the Supreme Court of this state had established a rule of construction, when it was interpreting a similar statute to the one in controversy; and in this cause, if this court should decide the question, whether the mechanics lien statute of Ohio is constitutional, differently from the decision of the Supreme Court of the state, it would create an "unseemly conflict," upon a question of local constitutional law.

Although the exact mechanics lien law of Ohio, in controversy, had not been the subject of judicial construction by the State Supreme Court, before the alleged rights of the complainant accrued, yet a similar statute was interpreted by it, in the case of Hampson & Parkinson vs. State of Ohio, 8 O., 315, before cited and quoted. The suit there was brought by sub-contractors, just as the amended bill in this cause was filed by sub-contractors. They prosecuted their claim under a special statute, which authorized them to file an amicable suit in the Supreme Court, *and which commanded the Supreme Court of the State of Ohio to disregard the objection, that they were sub-contractors, and to decide their claims upon fair and equitable*

principles, and to award them whatever might be found due in equity and justice. The statute was silent on the subject of payments made to the contractor, just as the mechanics lien statute involved in this case is silent.

Yet the Supreme Court of the State of Ohio used the significant language, and rendered the decision against the sub-contractor, to which we have before appealed. It was a decision upon an analogous statute. It was a warning to the complainants in this cause, what the decision of the Supreme Court would be, if a statute attempting to do what this mechanics lien law tries to do, should be passed by the legislature, and should be challenged in the Supreme Court.

One of the last judicial utterances of the Supreme Court of the United States relative to the duty of the Federal courts in determining how a state constitution or state statute should be consrued, is Hartford Fire Insurance Co. vs. Chicago & Milwaukee Ry. Co., 175 U. S., 91, 20 Sup. Ct. Rep., 33. The second paragraph of the syllabus reads:

> "Questions of public policy as affecting the liability for acts done or upon contracts made and to be performed within one of the states of the Union, when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application, are governed by the law of the state as expressed in its own constitution or statutes, or declared by its highest court."

A state court had decided that a contract exempting a railway company from liability for negligence was not against public policy; and the United States Supreme Court declared that that decision was not binding upon the United States Court sitting in that case. The state court decided the question twice. The first time it decided it in another case between other parties, and the decision was that such a contract was void. That decision was rendered, *after the contract,* which was passed upon by the United States Circuit Court, *was made;* afterwards there was a re-hearing granted, and the state court (of Iowa) reversed its former decision. The petition for a second re-hearing was dismissed. The case in the United States Circuit Court was pending at the time the other case was pending in the Supreme Court of Iowa. The United States Supreme Court concluded that the United States Circuit Court did right in following the last decision, instead of the first one.

This decision is decisive; it settles the controverted question in our favor. There can be no possible escape from it. Its identity on principle with this case is, on a comparison of the two conditions of fact in the cases, clear and certain.

A question touching the validity of a mechanic's lien is just as much a local question as a question in regard to the validity of a contract exempting a railroad company for liability for negligence. There are mechanics' lien statutes in every state of the Union, it is true; but it is equally true that negligence is committed by railroad companies in other states, and that contracts exempting them from liability may or may not be made in every state.

We also briefly refer to the case of Loeb vs. Trustees of Columbia Township, 179 U. S., 472, 21 Sup. Ct. Rep., 174. The fifth paragraph of the syllabus is:

> "The Federal Courts, in determining contract rights as affected by a state constitution, will enforce the contract in accordance with the constitution of the state as interpreted at the time the contract was made by the highest court of the state, without regard to a contrary interpretation made by such court after the contract was made."

The Supreme Court, approving the decision of the lower court said:

> "This was in accordance with the long established doctrine of this court, to the effect that the question arising in a suit in a Federal court, of the power of a municipal corporation to make negotiable securities, is to be determined by the law as judicially declared by the highest court of the state when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law, would not be affected by a different course of judicial decisions subsequently rendered, any more than by subsequent legislation."

There were conflicting decisions of the Supreme Court of the state. The first decision was rendered in State, ex rel. Hibbs vs. Franklin County Commissioners, 35 O. S., 458; the later decisions were rendered in State, ex rel. Broerman vs. Hamilton County Commissioners, 54 O. S., 333, and Hixson vs. Burson, Id., 470.

The contract, or rather the bonds, whose validity was challenged, were executed before the last two decisions were rendered.

The Supreme Court of the state *did not construe the same statute in the conflicting cases; they were merely similar statutes; but it de-*

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cided the same question in each of the cases. It was a question of state constitutional law.

It will doubtless be contended that, upon plain analogy between mechanics' liens and other liens that are created by law, the mechanic's lien statute was just in its provisions, so far as it favored sub-contractors, and that the mechanic's lien statute was constitutional. In other words, it will be probably contended that the sub-contractor's lien is a natural equity, and that it does not depend upon a contract made between him and the owner of the property. Common law and equity liens will, probably, be used to exemplify this proposition. For instance, an artisan or mechanic who receives materials with which he constructs an article for another, or receives an article to be repaired, has a lien upon the article for his labor. An inn keeper has a lien upon the baggage and personal effects of his guests for his board and lodging. A carrier or a workman has a lien for his charges. These are examples, not exhaustive, however, of common law liens.

A vendor of land who receives a part of the purchase money has a lien upon the land for the unpaid balance; a partner who has advanced money to a firm has a lien upon the interests of his co-partners. These are some examples of equitable liens. But none of these are analogous to the liens asserted by the complainant in the cause at bar.

There is one feature, which distinguishes all of these liens from the mechanics' lien claimed, and which we are combating. It is true the liens, the common law liens, and equitable liens themselves are not CREATED by agreements or contracts. To that extent there is a resemblance. But if there had been no contracts made between the parties, in cases where common law and equitable liens arise, there never would have been any liens. *To entitle the artisan or mechanic to his common law lien there must have been a contract previously made between him and the owner of the material, by which the artisan agreed to construct something out of the material, or repair it, and by which the owner of the material, either expressly or impliedly, agreed to pay him for his labor.* To entitle the inn keeper to his common law lien, there must have been an express or implied contract between the inn keeper and the boarder or lodger, by which the inn keeper, either expressly or impliedly, agreed to board or lodge the boarder or lodger, and the latter agreed to pay for the board or lodging. In none of these instances would there be any right to a

lien if the contracts and agreements mentioned had not been made prior to the origin of the liens.

So, to entitle the vendor of land to his lien, there must have preceded the creation of the lien a contract between him and the vendee, by which the vendor agreed to sell the land to the vendee, and the latter agreed to pay for it. But no such essential feature exists in the cause under discussion. The complainant does not pretend that there was any contract or agreement made between them and The Great Southern Fire-Proof Hotel Company, by which they agreed to furnish material for the company's hotel building, and the company agreed to pay them for it.

All the common law and equitable liens which are claimed to be analogous to the mechanic's lien involved in this cause are imposed by law upon the property of the person who, either expressly or impliedly, agreed to pay the artisan or mechanic for his labor, or the inn-keeper for his board and lodging, or the vendor for his land, and it is imposed to secure the performance of such agreement. This is not true of the mechanic's lien statute in question. That statute imposes the lien upon the owner's property to secure the performance, not of his own contract, but of another's contract—the chief contractor's contract. It imposes a lien upon the property of a person to secure the performance of a contract which that person had no art or part in making.

It makes the owner of the property responsible for the delinquency of the chief contractor, whose delinquency cannot be imputed to him.

It makes him a trustee for the sub-contractor and material man.

This is the iniquity and injustice of the statute. We insist that the state has no right to impose such burdens upon the property owner.

The analogy which is sought to be drawn between the mechanics' lien involved in this cause, and the common law and equitable liens mentioned has no foundation. Analogies are always dangerous. Illustrations have no value at all, unless they are true.

The vendor's equitable lien of the land sold is not a natural equity; it is not vindicated by a sentiment of natural justice. Some writers, and probably some courts, trace its origin to the trust relation which exists between the vendor and vendee; others regard it as an equitable mortgage; and still others declare that it arises from the implied intention of the parties.

In Ahrend vs. Odiorne, 118 Mass., 261, CHIEF JUSTICE GRAY maintained that the equitable lien of the vendor was due to the "fact that by the common law, land was free from the claims of simple contract creditors, and that it was invented by the chancellors to invade this unjust rule, and to give the grantor a security for his unpaid purchase money.

But Mr. Pomeroy has assigned a different and better reason for the existence of the lien. He said:

> "It is a most natural judicial conception that upon the sale of *any thing* on credit, the very identical thing sold should be regarded in some sort as a special fund out of which payment of the price was to be obtained, or at least secured, and that the seller should not be considered as parting *absolutely* with his whole interest and dominion until the price was fully paid." (3 Pomeroy Eq. Juris, Sec. 1250.)

The case at bar is not a case in which the obligation of the contract entered into by the complainants with McClain would be impaired by following the decision of the Supreme Court of Ohio. Their contracts had no other foundation than the statute itself. The Supreme Court in Douglas vs. County of Pike, 101 U. S., 677, decided that it would give to a change of decisions of the Supreme Court of a state on a question concerning an existing contract, that effect which would be given to a legislative amendment; that is to say, make it progressive, and not retrospective.

But if the Constitution is examined from the point of view of those who framed it, it is obvious that in declaring, "No state shall pass a law impairing the obligation of contracts," it was not intended to include the decision of the court under the term "law." The mischief aimed at was in the legislature, and not in the courts, said the Federalist. That court has settled the question; for in New Orleans Water Works Company vs. Louisiana, 125 U. S., 18, JUSTICE GRAY delivered the unanimous opinion of the court thus:

> "In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decision of its courts."

The Constitution of Ohio having been made long before the contract between the complainant and McClain was made, and its rights were acquired thereon, it cannot be said that it impaired the obligations of the contracts; and the decision of the Ohio Supreme Court, in Young vs. Hardware Co. did not impair them, for the reason given by the Supreme Court in the quotation which has just been quoted.

The decisions in 38 O. S., 122, and 42 O. S., 251, will probably be relied upon to sustain the contention that the Supreme Court of Ohio had previously rendered a decision contradictory of the decision in Young vs. Hardware Co. But the radical distinctions between the statute which was construed in those cases, and the statute now under consideration are obvious. The railroad statute required the contract between the owner of the property and the principal contractor, to provide that when the claims of persons who had either done labor or furnished materials for the erection of the building or structure, should equal ninety per cent. of the contract price, that they should be paid ratably. That provision, in itself, sterilizes the decisions which counsel relied upon. As the contract had to contain such a provision, the owner of the property could protect himself against paying the contract price twice. The statute also had some other provisions which make it radically different from the one under consideration.

Other decisions of the Supreme Court of Ohio in regard to the power of the legislature over contracts may be relied upon; but no decision has been cited which decides that the legislature has a right to make contracts for people. The decisions are simply to the effect that it is competent for the legislature to regulate the terms, and to determine the effect and validity of the contracts, but no further.

It will probably be asserted that other Supreme Courts of other states have passed upon similar statutes. That statement is only true of three Supreme Courts, and in neither of those cases was the question as to whether the mechanic's lien statute violated the constitutional guaranty, which has already been mentioned, agitated or considered or passed upon. In all the other states to which reference will be made by counsel on the other side, the statutes were essentially and radically different from the statute of Ohio. The statute of New York is an illustration. It limited the lien of the sub-contractor or material man to the money that was due on the contract from the owner to the principal contractor, at the time notice was served upon the owner by the sub-contractor.

It will be argued that the law, the statute, was part of these contracts entered into between the complainant and McClain; but if it was an unconstitutional law, it could have no force or effect as part of the contract.

We contend that this is a cause in which this court should adhere to the general rule, namely, that in determining what is the law of a state, it should follow the decisions of the highest court of the state; that there is no question of general or commercial law, or general law, or general jurisprudence, or common law, involved in these causes; that these are not causes in which the court is called upon to protect contract rights which were acquired under a decision of the highest court in the state, which was subsequently overruled by the same court; and that this is a case in which the parties, who invoked the jurisdiction of the Federal courts, in the first instance, were obliged to know, from a course of previous decisions of the Supreme Court of Ohio, and especially from their imputed knowledge of the decision of the Supreme Court of Ohio in Hampson & Parkison vs. State of Ohio, 8 O., 315, that their alleged claim would not be deemed valid.

We further insist and submit that it was never intended by the constitutional provision which gives this court jurisdiction, on the ground of diversity of citizenship, that the state laws should be subjected to a correcting process, or that the state law should be given an independent development, by the Federal courts.

But, if this court should reach the conclusion that this is a cause in which it should exercise its independent judgment, then we insist that there is no reasonable solution of the question other than that which was adopted by the Supreme Court of Ohio. The right to make one's own contract embraces, *ex vi termini*, the right to help determine the price at which labor and services are to be performed, and also the mode and time for the payment of such labor, and services. The legislature can *regulate* the making of contracts, and the effect of them when made; but it cannot control the terms. It cannot make a contract for a party, when the subject of the contract is unaffected by any public interest or duty to person, society or government, and the parties have the capacity to make the contracts. The legislature has no power, either to prohibit, or to prevent persons who are *sui juris* from making their own contracts, except when it effects a public interest or some duty to other persons, to society or to government.